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The Federal and State response to the Problem of Child maltreatment in America: A Survey of the Reporting Statutes

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Abstract

Society's concern with the abuse and neglect of children is not a new phenomenon, but as a result of heightened awareness by professionals and by the public in general, this problem is receiving new and intense scrutiny.

KEYWORDS: maltreatment, child, America

The Federal and State Response to the Problem of Child Maltreatment in America: A Survey of the Reporting Statutes

Society's concern with the abuse and neglect of children is not a new phenomenon,¹ but as a result of heightened awareness by professionals and by the public in general, this problem is receiving new and intense scrutiny. The issue extends to all members of society and particularly highlights the relationships existing between the legal, medical, and social services. Child abuse and neglect arise from a wide range of social and psychological problems that cannot be managed by any one discipline or profession. Physicians, lawyers, judges, teachers, and others must work together if the continuing cycle of maltreatment of children is to be broken.²

While all fifty states³ and Washington, D.C.,⁴ have child abuse statutes in one form or another, the legal framework provided for the protection of children in many instances is fragmented and unnecessarily complex. It is not unusual to find that workers involved with protecting children from abuse are not adequately equipped and trained to meet the critical demands assigned to them.⁵ Too often, the only treatment alternatives available to both child and parent are infrequent and inadequate home visits by social agencies, and overused foster care where the child may be moved from one home to another.

1. For an excellent discussion of the fate of children in history, see Thomas, *Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C. L. REV. 293 (1972) [hereinafter cited as *Child Abuse and Neglect*]. Child abuse is deeply ingrained in our cultural history. Many children who were ill or deformed at birth were murdered for reasons of maintaining a controlled population. It had long been an acceptable practice for children to be sold into bondage, tortured, or murdered.

2. See text accompanying notes 68-78, *infra*.

3. See note 122, *infra*.

4. *Id.* For statistical purposes, Washington, D.C. will be considered a state.

5. *Extension of the Child Abuse Prevention and Treatment Act, 1977: Hearings Before the Subcomm. on Child and Human Development of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 174 (1977-1978) (statement of Arabella Martinez, Assistant Secretary for Human Development) [hereinafter referred to as *1977 Senate Hearings*].

In dealing with child abuse, one is almost immediately confronted with traditional societal values which have precluded overt interference with the "integrity and sanctity of the family and for the privacy of its interrelationships."⁶ With the emergence of a greater understanding of the physical and psychological damage caused by child abuse, societal interest is moving toward an awareness of the need to promote the health and well-being of children. This concern has made itself known through the child abuse and neglect legislation enacted at federal and state levels within the past fifteen years.

1. EARLY HISTORY OF CHILD ABUSE IN AMERICA

It has been suggested that it is the very abhorrence of child abuse which has made it such a slow-moving area of both federal and state concern. The idea that a parent, who is supposed to love and protect his offspring, could be responsible for the child's physical injury or emotional deprivation is so repulsive that many are reluctant to believe it.⁷ The federal and state governments have also been hesitant to become involved in the internal mechanisms of the family. This implied hands-off policy followed by these governmental units is traceable to their close association with English common law.⁸ Under the common law, the right of the father to custody and control of his offspring was considered almost absolute, even where this was at odds with the welfare of the child.⁹

A child in colonial America was ruled over by the father. Parental discipline was quick, decisive, and severe.¹⁰ In a very real sense, the child

6. NAT'L. CENTER ON CHILD ABUSE & NEGLECT, U.S. DEP'T. OF HEALTH, EDUCATION & WELFARE, PROCEEDINGS OF THE FIRST NATIONAL CONFERENCE ON CHILD ABUSE & NEGLECT (1976) [hereinafter cited as PROCEEDINGS].

7. D. BAKAN, *SLAUGHTER OF THE INNOCENTS* 13 (1972).

8. The public welfare policy of this country originated with the passage in 1601 of England's Poor Relief Act. It later became popularly known as the Elizabethan Poor Law. The philosophy which put this legislation into action considered poverty a disgrace. The poor and destitute were considered a burden on the rest of society. Poverty was considered the result of one's own inability to better oneself. Welfare practices in this country were influenced by these English concepts. The use of physical force with children was permitted as a normal part of child-rearing behavior. PROCEEDINGS, *supra* note 6, at 55.

9. Singleman, *A Case of Neglect: Parens Patriae Versus Due Process in Child Neglect Proceedings*, 17 ARIZ. L. REV. 1055 (1975). See also Note, *Custody and Control of Children*, 5 FORDHAM L. REV. 460 (1936).

10. *Child Abuse and Neglect*, *supra* note 1, at 300.

was considered little more than the property of his parents.¹¹ It was not unusual for a child to be bound out to other households as an indentured servant or apprentice.¹² The shortage of labor in the American colonies, as well as the pervasive Puritan work ethic, was reflected by early laws passed by the various colonial legislatures.¹³ These early laws made a distinction between apprenticeship and servitude, but this was not always observed.¹⁴ Eventually two forms of apprenticeship evolved. Under a voluntary apprenticeship, the child and his parents entered into an agreement on their own initiative. The other form, compulsory apprenticeship, resulted from the practice of binding out dependent children, who had little or no say in the choice of their master or trade.¹⁵ As time passed, laws were enacted which prohibited the binding out of infants, but the practice of binding out children beyond infancy continued.

The earliest documented case of child abuse involved a master and his apprentice.¹⁶ In Salem, Massachusetts, in 1639, a man by the name of Marmaduke Perry was arraigned for the death of his apprentice. The evidence given stated that the boy had been ill-treated and subject to unreasonable correction by his master.¹⁷ However, the boy's own charge that the fractured skull he suffered was due to a broomstick blow delivered by his master (which later resulted in the boy's death) was disputed by testimony that the boy had told another person that he received the blow from falling out of a tree. The defendant was found not guilty. A Massachusetts court found another master guilty of extraordinary abuse of an apprentice; he was executed in 1643.¹⁸ Other early cases show the masters of servant children being verbally reprimanded, having their chattels confiscated, or even requiring that the children be freed from

11. See 5 FORDHAM L. REV., *supra* note 9, at 460.

12. Apprenticeships were often used by local governments to ensure that children were placed in a home environment which could adequately meet their needs. The need to fully utilize scarce labor was a strong economic factor of the times which overrode all other considerations. On many occasions, these apprenticeship practices were carried out by court officials despite the objections of the childrens' economically-disadvantaged parents.

13. 1 CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY, 1600-1865, at 122 (R. Bremmer ed. 1970) [hereinafter cited as 1 CHILDREN AND YOUTH].

14. Thomas, *Child Abuse and Neglect Part II: Historical Overview, Legal Matrix, and Social Perspectives in North Carolina*, 54 N.C. L. REV. 743, 745 (1976).

15. *Child Abuse and Neglect*, *supra* note 1, at 301.

16. 1 CHILDREN AND YOUTH, *supra* note 13, at 122.

17. *Id.*

18. *Id.* at 123.

indenture because of their ill treatment.¹⁹ In 1700, the colony of Virginia issued specific laws for the protection of servants against mistreatment.²⁰

The vast majority of these early cases dealt exclusively with the issue of a master's maltreatment of child servants. There is no indication of a similar movement to protect children from abusive or neglectful parents. Available court action involving the family was limited to removal of the child from an "unsuitable" home environment.²¹ "Unsuitable" usually referred to the parents' not providing their children with an adequate religious upbringing, or a general failure to teach them to become productive members of society.²² There were two Massachusetts cases, in 1675 and 1678, in which children were removed because of "unsuitable" homes.²³ The first case involved children who were removed from the home because the father refused to see that they were "put forth to service as the law directs."²⁴ The second case gave similar justification for the removal of children from the home environment, with that offense being compounded by the refusal of the father to attend church services on a regular basis.²⁵

The "societal solution" for disadvantaged children in the cities was to place them in almshouses.²⁶ Conditions in these poorhouses were unsatisfactory for adult paupers, let alone young children.²⁷ It was not

19. *Child Abuse and Neglect*, *supra* note 1, at 304.

20. 1 CHILDREN AND YOUTH, *supra* note 13, at 127.

21. *Id.* at 40.

22. *Id.* The "New England" or public vendue method of pauper relief was an ingenious and thrifty variant of the apprenticeship practices of the times. The town poor, the young, and the old were auctioned off to the lowest bidder for their services. The bidder who had the lowest bid would then accept his payment from public funds and take the child home as a servant or apprentice. The children usually came either from poor families or from families which the community felt would raise the children to become vagrants and undesirables.

23. *Child Abuse and Neglect*, *supra* note 1, at 304.

24. 1 CHILDREN AND YOUTH, *supra* note 13, at 41.

25. *Id.*

26. By 1800, the system of almshouses in the United States was rapidly becoming institutionalized. Some 16 states had such a system in extensive operation. The "almshouse" approach lasted until the end of the 1800's. Reform was slow owing to the resistance of those who ran the almshouses and had a large investment in the lands and buildings used. The ease with which children could be placed in such institutions and forgotten, and the inability to come up with alternative methods of care, also created a state of inertia against change. *Child Abuse and Neglect*, *supra* note 1, at 304.

27. *Id.*, where it was reported that a large number of children (both poor and

until the beginning of the nineteenth century that major efforts were made to provide separate residences for children, and it took nearly 100 more years before broad-based improvements appeared.²⁸

The near absence of recorded family child abuse cases in the early history of this country suggests a trend of the courts to allow a child's parents their own discretion in determining the kind and degree of discipline in the home. Parents were believed to be immune from prosecution unless the disciplining of children went beyond the bounds of reasonableness in relation to the offense, or was deemed excessive, or injured the child permanently.²⁹ There existed a legal presumption in the courts which favored the conduct of the parents as being reasonable.³⁰

An 1840 criminal case in Tennessee involved parental prosecution for excessive punishment.³¹ The court record indicates that the mother had repeatedly beaten the child with her fists, and that both parents had systematically maltreated the child. The court, in reversing the mother's conviction, noted without citing any precedent that the "right of parents to chastise their refractory and disobedient children is so necessary to the government of families . . . that no moralist or lawgiver has ever thought of interfering with its existence. . . ."³²

A. Nineteenth Century Awakening of Concern

It was not until the second decade of the nineteenth century that

orphaned) were indiscriminately placed with adult paupers, the mentally unbalanced and retarded, alcoholics, and persons suffering from venereal disease.

28. See Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1193 (1970), for an examination of the events leading up to the passage of the 1899 Illinois Juvenile Court Act. One of the purposes of the Act was to improve the condition of children in orphanages, poor houses, and detention centers.

29. *Child Abuse and Neglect*, *supra* note 1, at 305.

30. See *State v. Pendergrass*, 19 N.C. 348 (1837). Even though this case concerned the right of a teacher to punish a child in the classroom, the court interpreted this right as being coextensive with that of a parent. See also Kleinfield, *The Balance of Power Between Infants, Parents and the State*, 4 FAM. L. Q. 408, 413 (1970).

31. *Johnson v. State*, 21 Tenn. 282 (1840).

32. *Id.* In this case, the question for the jury to determine was whether the correction of a child by the defendant so far exceeded the reasonable limits of parental duty and authority as to amount to a trespass and breach of the peace. The court was of the opinion that this was a conclusion of fact, to be drawn by the jury, rather than a conclusion of law. The trial court judge had charged the jury in such a manner as to encroach upon the province of the jury regarding matters of fact. The court reversed the judgment and remanded the case for a new trial.

public authorities began to interfere in cases of parental neglect. Most of these reform movements were directed toward children in institutions, however, and were aimed primarily at preventing a neglected child from entering a life of crime.³³ Probably the most significant and helpful of these numerous reform campaigns for child protection was launched by persons connected with the American Society for the Prevention of Cruelty to Animals (ASPCA).

In New York City in 1874, an old woman near death informed a church worker who lived in a nearby building that she was aware of a young girl who was being terribly treated by her step-mother. As a last wish the old woman wanted to tell someone about this "so she could rest in peace."³⁴ The church worker sought the help of Henry Bergh who at that time was the president of the ASPCA. Bergh looked into the matter and soon thereafter decided to initiate an action, not as president of the ASPCA, but rather as an individual. He did, however, use the services of two of the Society's attorneys—Elbridge Gerry and Ambrose Monell—as legal counsel in the matter.³⁵ The child, Mary Ellen Wilson, was apprenticed to her step-mother Mary Connolly in 1866. At that time Mary Ellen was less than two years old. The New York Times printed a number of articles concerning court hearings in the spring of 1874 which have formed the basis for a case history.³⁶

On April 13, 1874, Mrs. Connolly was indicted by the Grand Jury of the Court of General Sessions for various offenses which included "five indictments for assault and battery, felonious assault, assault with intent to do bodily harm, assault with intent to kill, and assault with intent to maim."³⁷ Evidence presented at trial by numerous witnesses

33. See Fox, *supra* note 28, at 1232-33. Fox noted that the concept of preventive penology rested essentially on the belief that society could recognize the conditions of childhood that would give rise to adult criminals, and develop techniques such as institutions, foster homes, and specific probation procedures that would be able to arrest the condition and prevent the crime. It was believed that legal mechanisms could be used to enact legislation that could carry out these "reforms."

34. 2 CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY, 1866-1932, at 185 (R. Bremmer ed. 1971) [hereinafter cited as 2 CHILDREN AND YOUTH]. See also *Child Abuse and Neglect*, *supra* note 1, at 307-10, for a thorough discussion of the Mary Ellen case.

35. *Child Abuse and Neglect*, *supra* note 1, at 307. See also N.Y. Times, April 11, 1874, at 2, col. 6.

36. The New York Times provides much of the knowledge of this case through a series of articles which it printed from April 10, 1874, through December 12, 1875.

37. N.Y. Times, April 14, 1874, at 2, col. 4.

strongly indicated that a severe condition of abuse and neglect had purposefully been perpetrated against Mary Ellen. The jury returned a verdict of guilty after only twenty minutes of deliberation. Mrs. Connolly was sentenced to one year at hard labor in the state prison.³⁸ Mary Ellen was later sent to the Sheltering Arms, an orphanage in New York City.

One commentator has noted that “some historical and legal confusion has resulted from the close relationship between the animal and child protection movements in connection with this case.”³⁹ A number of articles in the legal and social service fields cite the myth of the Mary Ellen case as an instance where the ASPCA used the laws against cruelty to animals as the basis for protecting the child.⁴⁰ In reciting this myth, these articles concluded that Mary Ellen, as a member of the animal kingdom, was entitled to the protection of laws originally enacted to safeguard animals from cruel treatment. The facts of the Mary Ellen case clearly demonstrate a state of governmental neglect with regard to the supervision and protection of children after agency placements had been made.⁴¹

In the aftermath of public indignation over the case, Elbridge T. Gerry, the ASPCA attorney whose services were used by Bergh, founded the New York Society for the Prevention of Cruelty to Children (NYSPCC). It was originally organized as a private group and later incorporated. Legislation was soon thereafter passed in New York which authorized the NYSPCC and later similar societies to file complaints for the violation of any laws relating to children. A requirement of this legislation was that law enforcement officials and the courts were to aid the societies whenever possible.⁴²

Similar societies were soon organized in other cities throughout the nation, and by 1922 there existed some 57 Societies for the Prevention of Cruelty to Children, and 307 humane societies concerned with the welfare of children. With the advent of government intervention into

38. N.Y. Times, April 28, 1874, at 8, col. 1.

39. *Child Abuse and Neglect*, *supra* note 1, at 308.

40. The myth of the Mary Ellen case continues to appear from time to time in social and legal literature. Some recent articles containing the myth include: Daly, *Willful Child Abuse and State Reporting Statutes*, 23 U. MIAMI L. REV. 283, 284 (1969); Friedrich & Borniskin, *Child Abuse and Neglect in North Dakota*, 53 N. DAK. L. REV. 197, 200 (1976); Katz, *Legal Research on Child Abuse and Neglect: Past and Future*, 11 FAM. L. Q. 151 n.1 (1977).

41. *Child Abuse and Neglect*, *supra* note 1, at 310.

42. *Id.* at 310.

child welfare, however, the number of these societies began to decline rapidly.⁴³

B. Some Familial Characteristics of Child Abuse

An early commentator on the treatment of children noted that "the general history of the child . . . moves as from one mountain peak to another with a long valley of gloom in between."⁴⁴ Numerous reform movements have been inaugurated with the hope of curtailing child abuse only to fall by the wayside as the shocking facts of abuse and neglect become avoided or forgotten over time.⁴⁵ Concern reawakened when a pediatric radiologist wrote an article in 1946 which called to the attention of the medical community an "unrecognized trauma" described as subdural hematomas and multiple bone abnormalities in children he had treated.⁴⁶ Seven years later, in 1953, Dr. Silverman wrote an article describing multiple fractures due to recurrent trauma.⁴⁷ By 1955, medical journal authors had begun to recognize that the injuries previously called "unrecognized trauma" were inflicted intentionally by abusive parents.⁴⁸ Doctors Wooley and Evans wrote an article in 1955 suggesting the possibility of parental or child custodial abuse.⁴⁹

The spark in this resurgence of interest in child abuse was not a case of abuse like the trial of Mary Ellen's guardian, but rather the advent of a technological revolution which had changed the course of medicine. The beneficial uses of x-rays by pediatric radiologists have

43. *Id.* at 313.

44. G. PAYNE, *THE CHILD IN HUMAN HISTORY* 302 (1916), as quoted in *Child Abuse and Neglect*, *supra* note 1, at 293.

45. *Child Abuse and Neglect*, *supra* note 1, at 293.

46. Caffey, *Multiple Fractures on the Long Bones of Infants Suffering from Chronic Subdural Hematoma*, 56 AM. J. ROENTGENOLOGY 163 (1946). Subdural hematoma is defined as "[a] hematoma (localized collection of clotted blood) occurring beneath the dura mater (which is the outer of the three membranes covering the brain and spinal cord)." J. SCHMIDT, 2 ATTORNEY'S DICTIONARY OF MEDICINE S-135 (1975). Caffey did not explain what may have caused such injuries, only that they were traumatic in origin. This gave rise to the phrase associated with such injuries—"unrecognized trauma."

47. Silverman, *The Roentgen Manifestations of Unrecognized Skeletal Trauma in Infants*, 69 AM. J. ROENTGENOLOGY 413 (1953).

48. See, e.g., Bakwin, *Multiple Skeletal Lesions in Young Children Due to Trauma*, 49 J. PEDIATRICS 57 (1956).

49. Wooley & Evans, *Significance of Skeletal Lesions in Infants Resembling Those of Traumatic Origin*, 158 J.A.M.A. 593 (1955).

resulted in more sophisticated ways of seeing subdural hematomas and abnormal fractures.⁵⁰

It was not until July 1962, however, that the full impact of physical abuse was brought to the attention of the medical profession and subsequently to the social service and legal professions, as well.⁵¹ At that time, Dr. C. Henry Kempe and others published the classic paper which defined the *battered child syndrome* as “a term used by us to characterize a clinical condition in young children who have received serious physical abuse, generally from a parent or foster parent.”⁵² The impact of this paper was considerable. The concept of child abuse as inflicted injury in the Kempe paper was admittedly narrow.⁵³ Dr. Fontana proposed a more broadly defined maltreatment syndrome in which the child “often presents itself without obvious signs of being battered but with the multiple minor evidences of emotional and at times, nutritional deprivation, neglect and abuse. The battered child is only the last phase of the spectrum of the maltreatment syndrome.”⁵⁴

Numerous studies indicate that in families with more than one child, usually only one of the children is singled out for systematic abuse.⁵⁵ Race, ethnic background, and the socio-economic status of abusive parents have been found to have no correlation with child abuse.⁵⁶ Recent studies have found that child abuse and neglect are not

50. The abused child may have fractures distributed about the body. The value of x-rays rests essentially on the ease with which previous fractures, some of which may not be fully healed, can be discerned. To the informed physician, a child's skeleton can reveal a long history of abuse by telltale signs of unaided bone healing. Silverman, *Radiological Aspects of the Battered Child Syndrome*, in *THE BATTERED CHILD* (Kempe & Helfer, eds., 2d ed., 1974).

51. During the early 1960's, the contribution of legal scholars to the area of child abuse literature was confined primarily to nonlegal publications: Gil, *The Legal Nature of Neglect*, 6 NATIONAL PROBATION AND PAROLE A.J. 1 (1960); Harper, *The Physician, The Battered Child, and the Law*, 31 PEDIATRICS 899 (1963).

52. Kempe, Silverman, Steele, Droegemueller, & Silver, *The Battered Child Syndrome*, 181 J.A.M.A. 17 (1962).

53. *Id.* at 19.

54. Fontana, Donovan, & Wong, *The “Maltreatment Syndrome” in Children*, 269 NEW ENGLAND J. MED. 1389 (1963).

55. See Note, *The Battered Child: Logic in Search of Law*, 8 SAN DIEGO L. REV. 374 (1971); see also Daly, *supra* note 40, at 290.

56. Note, *supra* note 55, at 374. But see Newberger & Hyde, *Child Abuse, Principles and Implications of Current Pediatric Practice*, 22 PEDIATRIC CLINICS OF NORTH AMERICA 695 (1975), where it has been observed that child abuse is associated with poverty, low birth weight, and social isolation.

problems of poor and marginal families alone.⁵⁷ They are problems which affect children of all social classes. Yet child abuse in poor and marginal families is most often reported. One reason may be that the more affluent families, whose children receive their medical care in private practice settings, have a different relationship between practitioner and family. These families tend to have their injuries characterized as "accidents," which connotes isolated, random events.⁵⁸ Research has shown that there is an association between childhood accidents and child abuse and neglect.⁵⁹ Many child abuse and neglect cases in wealthier homes are misdiagnosed as "accidents." The terms "abuse" and "neglect" carry important, implicit judgments which doctors are often reluctant to make.⁶⁰ As one commentator notes:

It's easier to make the diagnosis of child abuse if you are a physician in an inner-city hospital room or in a clinic for the indigent. . . . It is also less painful to report the case, where the family is not paying you directly, and where you may never see them again.⁶¹

Estimates of child abuse and neglect range from projections of 10,000 children abused each year to one million.⁶² Clear empirical knowledge as to the number of deaths resulting from child abuse and severe neglect is also limited. Estimates range from 700 per year⁶³ to 6,000 per year.⁶⁴ Because of this wide range of estimates, it is difficult to draw a conclusion as to the actual incidence of child abuse in this country.⁶⁵ The information gleaned from official statistics must be quali-

57. See Daly, *supra* note 40, at 290.

58. 1977 Senate Hearings, *supra* note 5, at 44 (statement of Eli Newberger).

59. *Id.*

60. *Id.* at 53.

61. *Id.*

62. See Grumet, *The Plaintive Plaintiffs: Victims of the Battered Child Syndrome*, 4 FAM. L.Q. 296, 301 (1970), for an early estimate of the frequency of abuse cases. One commentator has estimated abuse cases in excess of one million. Light, *Abused and Neglected Children in America*, 43 HARV. EDUC. REV. 556, 567 (1975).

63. V. FONTANA, *THE MALTREATED CHILD: THE MALTREATMENT SYNDROME IN CHILDREN* 6 (2d ed. 1971).

64. Kempe, *Approaches to Preventing Child Abuse*, 130 AM. J. DIS. CHILD. 941, 945 (1976).

65. A number of research projects use what might be termed "statistical alchemy" in developing incidence rates for child abuse in this country. The use of local or regional estimates applied to the national population only yield a distorted, if not inaccurate, picture of the true incidence of abuse. 1977 SENATE HEARINGS, *supra* note 5, at 12.

fied by the fact that they represent only “caught” cases of abuse which became cases through varied reporting and confirmation procedures.⁶⁶

While physical punishment of children appears to be almost a universal aspect of the parent-child relationship, very little is known about the modes and patterns of violence toward children. Numerous studies have shown that abuse in families may not be as haphazard an occurrence as has been previously supposed.⁶⁷ One expert believes that this generation’s battered children, if they survive, will become the next generation’s battering parents.⁶⁸ The most important aspect of this “cyclical pattern” is that of those neglected and abused children who survive, many will suffer future emotional and psychological crippling which will be passed on to succeeding generations.⁶⁹ Abusive and neglectful parents have often been found to be lonely, isolated people, with few friends and little outside contact with society.⁷⁰ Numerous forms of dysfunction of the home environment may occur in conjunction with instances of child abuse.⁷¹

The abuse and neglect of children by parents may occur at any age with an increased incidence in children under three years of age. A large percentage of these children are under six months of age.⁷² The lives of abusing parents are often marked with divorce, extra-marital relationships, alcoholism, poor housing, and financial distress.⁷³ These stress

66. Another difficulty in determining what is an accurate picture of the abuse problem is relying solely on reported or “caught” cases of child abuse and neglect. Like the tip of an iceberg, which may only represent 10% of the total mass, “caught” cases of abuse do not accurately represent the totality of the problem. The statistics used by many researchers should be prefaced by a statement explaining what they actually are—“educated guesses.”

67. See D. GIL, *VIOLENCE AGAINST CHILDREN: PHYSICAL CHILD ABUSE IN THE UNITED STATES* 27 (1971); Friedrich & Borniskin, *supra* note 40, at 205.

68. 1977 *Senate Hearings*, *supra* note 5, at 502 (statement of Vincent J. Fontana, M.D.).

69. *Child Abuse and Neglect*, *supra* note 1, at 335.

70. See, e.g., Friedrich & Borniskin, *supra* note 40, at 205; Note, *supra* note 55, at 375; Daly, *supra* note 40, at 292.

71. Friedrich & Borniskin, *supra* note 40, at 202, where it was noted that marital conflict, social isolation, and the social pressures of financial adversity act in conjunction with the abuse of children who are members of families with such difficulties.

72. 1977 *Senate Hearings*, *supra* note 5, at 505 (statement of Vincent J. Fontana, M.D.). Very young children are abused more often than older children because they are usually unable to protect themselves and generally must rely on the help of others.

73. The National Clearinghouse on Child Abuse and Neglect, Children’s Division of the American Humane Association, gathered information on child abuse and neglect

factors all contribute to the condition that causes the potentially abusive parent to strike out at a special child during a crisis situation. The parents' own lack of love, support, and protection makes them unable to give love, affection, and empathic care to their own children.⁷⁴ One commentator has developed a schema of the life cycle of an abused child becoming an abusing parent.⁷⁵ The schema is entitled the World of

for the calendar year 1975. In examining the figures which follow, the caveats stated in notes 65-66, *supra*, should be considered.

I. <i>Reporting: Neglect and Abuse</i>	Number	Per cent
Total number of reports of neglect and abuse	289,837	
Number of cases investigated	228,899	79.0%
Status undetermined	60,938	21.0%
Of investigated cases of neglect and abuse:	(228,899)	
found to be valid	136,504	59.6%
found not valid	92,395	40.4%
II. <i>Alleged Abusers-Neglecters</i>		
Natural parents		(83.80%)
Step-parents		(6.08%)
Adoptive parents		(0.10%)
Paramours		(1.80%)
III. <i>Types of Abuse Reported</i>		
Physical injuries, minor	30,310	(50.3%)
Sexual abuse	6,372	(10.6%)
Physical injuries, major	1,384	(2.3%)
Burns, scalding	1,578	(2.6%)
Physical abuse (unspecified)	20,557	(34.1%)

Proposed Extension of the Child Abuse and Treatment Act, 1977: Hearings Before the Subcommittee on Select Education of the House Committee on Education and Labor, 95th Cong., 1st Sess. 149 (1977-78) [hereinafter cited as House Hearings].

74. This emotional neglect, or the lack of a warm, sensitive interaction necessary for the child's optimal growth and development, may have tragic consequences for the child as he reaches adulthood. The absence of adequate empathic care or mothering during the first two years of life may cause the child to lack basic trust and confidence. NAT'L CENTER ON CHILD ABUSE & NEGLECT, U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, 1 CHILD ABUSE AND NEGLECT: THE PROBLEM AND ITS MANAGEMENT 18 (1975).

75. R. Helfer, THE DIAGNOSTIC PROCESS AND TREATMENT PROCESS 26 (U.S. Dep't. Health, Ed., & Welfare, Publ. No. (OHD) 75-69, 1975).

Abnormal Rearing, or the WAR cycle. It views a child from conception through mating, with the intervening steps illustrating how environmental factors may largely determine how the child will function in society.⁷⁶

The inability of abusive parents to cope with the rearing of their children has led commentators to suggest that the essential element in this abuse and neglect is not the parents' intention to destroy the children, but rather their inadequacy to nurture them properly.⁷⁷ This inability to care for children may cause such children to suffer emotional as well as physical trauma which, if allowed to continue, will ultimately threaten their survival.⁷⁸

2. THE LEGAL RESPONSE—CHILD ABUSE LEGISLATION AT FEDERAL AND STATE LEVELS

Without adequate guidance at federal and state levels, little success can be expected in the areas of preventing and treating cases of child abuse and neglect. The grim reality of child abuse and the revelations of research in this area have spurred communities into social action. Public concern and recognition of need have pressured legislative bodies into giving attention to the problem at a pace with little precedent in recent legislative history.⁷⁹ The introduction of child abuse legislation in 1963 amounted to eighteen bills, eleven of which achieved passage that year.⁸⁰ California was reputed to be the first state in the nation to have enacted a child abuse reporting statute, which required certain designated groups to report known or suspected instances of abuse.⁸¹ In 1964, ten more states passed reporting laws, with another twenty-six states

76. For a brief examination of the twelve steps of the WAR cycle, see Friedrich & Borniskin, *supra* note 40, at 206.

77. Newberger, *The Myth of the Battered Child Syndrome*, 40 CURRENT MED. DIALOG 327 (1973).

78. *Id.*

79. See Daly, *supra* note 40, at 284-85, where she suggests that the rapid passage of the child abuse reporting laws was due to a combined mass media response to the problem. This resulted in an outpouring of public attention on the subject which compelled legislatures to enact state reporting laws.

80. D. GIL, *supra* note 67, at 21-22.

81. California was reputed to have an earlier statute, but it did not specifically relate to children. The old law required reporting of any injuries by any person in violation of any penal statute. For a discussion of the 1963 California Act see McCoid, *The Battered Child and Other Assaults Upon the Family: Part One*, 50 MINN. L. REV. 1, 21-22 (1965).

doing so in 1965.⁸² Some of the laws enacted by state legislatures between 1963 and 1967 were hastily conceived and reflected public indignation against parents who abused their children. Most of these early statutes, however, accurately saw the need for protective social services on behalf of the child victims.⁸³

These laws were characterized by many differences in form and substance. They also contained many similarities, due in large measure to suggested legislative guidelines developed by various private and governmental agencies which promoted mandatory reporting laws.

The most significant of these model acts which motivated the establishment of reporting laws was one proposed by the Children's Bureau of the United States Department of Health, Education and Welfare.⁸⁴ This legislative model acted as a catalyst in encouraging the states to require mandatory reporting of cases of child abuse.⁸⁵ In 1963, the Children's Division of the American Humane Association promulgated its own legislative guideline.⁸⁶ While the Children's Bureau model restricted its mandatory reporting to physicians, the AHA model extended such reporting of child abuse or neglect to public or private welfare community agencies.⁸⁷ Legislative guides were published by other medical associations during this period, as well. The New York County Medical Association suggested legislation that would extend

82. D. GIL, *supra* note 67, at 21-22.

83. Sussman, *Reporting Child Abuse: A Review of the Literature*, 8 FAM. L. Q. 245, 310 (1974), where it is noted that the main function of the reporting statutes is to ensure that various social and protective services of the state are activated to treat the child and the parents while, at the same time, protecting the child from further harm. But see Fraser, *Independent Representation for the Child: The Guardian Ad Litem*, 13 CALIF. WESTERN L. REV. 16, 19 (1976), where he asserted that the purpose of the initial statutes was misleading. The quick identification of abused children by a mandated group of reporters, the rapid investigation of reported cases, and adequate treatment being offered all proved to be too simplistic. Fraser concluded:

In short, persons who were mandated to report did not know that they were so obligated and furthermore, were not aware of child abuse. Many of the persons who were able to identify the symptoms and knew of their obligation to report, refused to do so even though a number of states included a criminal provision for a failure to report. Finally, effective treatment was not available in most communities.

84. For the text of this model act see McCoid, *supra* note 81, at 20.

85. Sussman, *supra* note 83, at 247; see also Paulsen, *Child Abuse Reporting Laws: The Shape of the Legislation*, 67 COLUM. L. REV. 1, 3 (1967).

86. *Child Abuse and Neglect*, *supra* note 1, at 331.

87. *Id.*

coverage beyond physicians and hospitals to “persons, firms or corporations conducting a pharmacy.”⁸⁸

Two newer models have recently been promulgated. The first is the American Bar Association Juvenile Justice Standards Project, which developed a Model Child Abusing Report.⁸⁹ Even though the final draft of this model act was proposed after the enactment of the 1974 Federal Child Abuse Prevention and Treatment Act,⁹⁰ it does not appear to meet the scope of that Act’s requirements. Another recent addition to the list of model acts is the model developed by the Education Commission of the States.⁹¹ The primary purpose of this model is to offer state legislatures a guideline on how best to meet the broad requirements of the Federal Act.

A. Federal Legislation

Government at the national level did not become involved in the welfare of children until 1912, when, after much debate, Congress promulgated an act which established the United States Children’s Bureau.⁹² This act became law on April 9, 1912, and authorized the establishment of a bureau which was charged to conduct research and provide information about children.⁹³ With the passage of the Social Security Act during President Roosevelt’s first term in office in 1935,⁹⁴ the federal government became more directly involved in child welfare services.⁹⁵ The emphasis was placed upon the “protection and care of the

88. For the text of this model act *see* Daly, *supra* note 40, at 312-13.

89. ABA, MODEL CHILD ABUSE AND NEGLECT REPORTING LAW (Jan. 3, 1975).

90. 42 U.S.C. § 5101-06 (Supp. V 1975) [hereinafter referred to as Federal Act]. The House Committee on Education and Labor submitted Report No. 95-609 to the Committee of the Whole House on September 14, 1977. H.R. 6693, a Bill entitled “Child Abuse Prevention and Treatment Amendments of 1977,” passed the House on September 26, 1977. H.R. 6693 passed the Senate with amendments containing the text of S. 961 on October 27, 1977, with S. 961 being indefinitely postponed. H.R. 6693, as amended, extends the Child Abuse Prevention and Treatment Act through the fiscal year ending September 30, 1982. HOUSE COMM. ON EDUCATION AND LABOR, CHILD ABUSE PREVENTION AND TREATMENT AMENDMENTS OF 1977, H.R. Rep. No. 609, 95th Cong., 1st Sess. 1 (1977) [hereinafter cited as 1977 HOUSE AMENDMENTS].

91. EDUCATION COMMISSION ON THE STATES, CHILD ABUSE AND NEGLECT MODEL LEGISLATION FOR THE STATES (March 1976).

92. 42 U.S.C. §§ 191-94 (1970).

93. *Id.* § 192.

94. Ch. 531, 49 Stat. 620 (1935)(codified at 42 U.S.C. §§ 301-1396).

95. *Id.* § 521(a), 49 Stat. 633 (codified at 42 U.S.C. § 721), *repealed by* Social

homeless, dependent and neglected children and children in danger of becoming delinquent."⁹⁶

Congress made significant amendments to the Social Security Act in 1962⁹⁷ which required each state to make child welfare services available to all children. It provides the necessary co-ordination between current child welfare services⁹⁸ and the social services under the Aid to Families with Dependent Children program.⁹⁹ This latter requirement was to be accomplished by maximizing the use of existing personnel in providing basic services to those qualified for the programs. This amendment broadened the definition of "child welfare services" to include the prevention of child abuse.¹⁰⁰

Under Title IV-B of the Social Security Act,¹⁰¹ federal funding had been fixed at \$46 to \$50 million from 1972 to 1974.¹⁰² Of these sums available for IV-B activities, only \$507,000 was spent on activities related to child abuse.¹⁰³ It is clear that the Act purposefully limited itself to assisting the states through the commitment of funds and research grants for child welfare programs. Recently, however, the federal government established a mandatory reporting requirement and created a National Center on Child Abuse and Neglect.¹⁰⁴

Security Amendments of 1967, § 240, Pub. L. No. 90-248, 81 Stat. 911, 915 (1968).

96. *Id.*

97. Public Welfare Amendments of 1962, Pub. L. No. 87-543, 76 Stat. 172 (codified in scattered sections of 42 U.S.C.).

98. *Id.* § 102(b), 76 Stat. 182-83 (codified at 42 U.S.C. § 723), *repealed by* Social Security Amendments of 1967, § 240, Pub. L. No. 90-248, 81 Stat. 911, 915 (1968).

99. *Id.* § 105(a), 76 Stat. 186-87 (codified at 42 U.S.C. § 609).

100. *Id.* § 102(d), 76 Stat. 184 (codified at 42 U.S.C. §§ 721 & 728, *repealed by* Social Security Amendments of 1967, § 240, Pub. L. No. 90-248, 81 Stat. 911 (1968). *See* 42 U.S.C. § 625 (1970) for present definition.

101. Title IV-B of the Social Security Act authorizes child welfare programs including protective services for children. 42 U.S.C. §§ 602-26 (1970), *as amended by* Social Security Amendments of 1972, Pub. L. No. 92-603, § 412, 86 Stat. 1492, Social Services Amendments of 1974, Pub. L. No. 93-647, §§ 6 & 8, 88 Stat. 2348-49, Fiscal Year Adjustment Act, Pub. L. No. 94-273, § 22, 90 Stat. 375.

102. H.R. Rep. No. 685, 93d Cong., 1st Sess. 3, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 2763, 2765.

103. *Id.*

104. 42 U.S.C. § 5101 (Supp. V 1975). H.R. 6693 would require that the Secretary of Health, Education and Welfare establish research priorities for the making of grants of contracts. Further, the Secretary would be required to submit proposed priorities to the Federal Register at least 60 days before their establishment, for public comment. 1977 HOUSE AMENDMENTS, *supra* note 90, at 10.

The Federal Act provides assistance at the national level for the identification, prevention, and treatment of child abuse and neglect.¹⁰⁵ This legislation went beyond that of a mere reporting statute and “mandated certain remedial and therapeutic steps be taken upon receipt of a child abuse report.”¹⁰⁶ The Federal Act envisions the reporting of child abuse as the first of a series of steps in a comprehensive plan for child protection and for the amelioration of the abused child’s environment. Not only does the Federal Act seek to place a greater emphasis on social worker case work, rather than mere case carrying,¹⁰⁷ it also entails having available a trained staff of state and local personnel who can closely examine every suspected case of child abuse.

The National Center on Child Abuse and Neglect is required to collect and distribute information on child abuse, and also gather information toward an annual survey of child abuse and neglect in the nation. Federal monies are available for specific purposes, which include project grants and research contracts designed to assist in the identification, prevention, and treatment of child abuse and neglect.¹⁰⁸ These funds may be spent on demonstration programs and the establishment and maintenance of centers which provide additional counseling services.¹⁰⁹

The primary benefits of the Federal Act are directed at the state level. A grant system has been devised that requires not “less than 5 percent of the monies appropriated in carrying out the Act . . . to go to the states”¹¹⁰ for the purpose of developing, strengthening, and carrying out child abuse prevention treatment programs. The Federal Act also mandates that not less than fifty per cent of the funds available for any fiscal year must be spent on grants to and contracts with “public agencies or nonprofit private organizations (or combinations thereof) for demonstration programs and projects designed to prevent, identify

105. 42 U.S.C. §§ 5101-06 (Supp. V 1975).

106. Krause, *Child Abuse and Neglect Reporting Legislation in Missouri*, 42 Mo. L. REV. 207, 216 (1977).

107. Paulsen, *supra* note 85, at 3.

108. 42 U.S.C. § 5101(b)-(c) (Supp. V 1975). H.R. 6693 requires that grants made under the Federal Act may be made for a maximum period of three years. Review of such grants must be on an annual basis. 1977 HOUSE AMENDMENTS, *supra* note 90, at 10.

109. 42 U.S.C. § 5103(a)(4)(Supp. V 1975).

110. 42 U.S.C. § 5103(b)(1)(Supp. V 1975). H.R. 6693 would permit up to 30% of funds appropriated for any fiscal year to be used in the form of grants to the states. 1977 HOUSE AMENDMENTS, *supra* note 90, at 11.

and treat child abuse and neglect.”¹¹¹

For a state to qualify for assistance under the Federal Act a number of rather stringent requirements must be met. These requirements include:¹¹² (1) implementation of a state program which provides for reporting of known or suspected instances of child abuse and neglect; (2) prompt investigation of reports by properly constituted authorities; (3) specific administrative procedures and adequate personnel to deal with child abuse and neglect; (4) immunity provisions for persons reporting suspected instances of child abuse and neglect so long as such reports are made in good faith; (5) preservation of the confidentiality of records, with criminal sanctions being exacted against those who disseminate such information in an unauthorized manner; (6) co-operation between agencies dealing with child abuse and neglect cases; (7) public dissemination of information on the problems, incidence, and other related information assisting in the identification, prevention, and treatment of child abuse and neglect; (8) a prohibition against any state cutback in expenditures appropriated for child abuse and neglect programs below that of funds designated in fiscal year 1973; and (9) to the extent feasible, the Federal Act calls for the co-operation of the state agencies with parental organizations which are combatting child abuse and neglect in their respective states. The states are also required to appoint a guardian *ad litem* to represent an abused or neglected child in a judicial proceeding.¹¹³

Even though the Federal Act has been in existence for four years, not all of the states have been able to comply fully with its provisions for funding purposes.¹¹⁴ A number of reasons have been cited which

111. 42 U.S.C. § 5103(a)(Supp. V 1975). H.R. 6693 would authorize that programs “funded under section 4 of the act shall include service programs and projects, in addition to demonstration programs and projects.” This would permit federal support for direct services to abused children and their families in lieu of grants given strictly for research and demonstration projects. 1977 HOUSE AMENDMENTS, *supra* note 90, at 10-11.

112. 42 U.S.C. § 5103(b)(2)(A)-(J)(Supp. V 1975). H.R. 6693 does not address itself to this section of the Federal Act.

113. *Id.* § 5103(b)(2)(G) (Supp. V 1975).

114. The following is a list of states eligible for federal monies by fiscal year. Fiscal Year 1974: Hawaii, New York, Tennessee. Fiscal Year 1975: Arkansas, Connecticut, Illinois, Maine, Massachusetts, Minnesota, Missouri, New Hampshire, North Dakota, Oklahoma, Utah, Vermont, Virginia. Fiscal Year 1976: Alabama, California, Delaware*, Kansas, Louisiana*, Michigan*, New Jersey*, Rhode Island, South Dakota, Texas*, Washington*. States with an asterisk have been placed in a conditional grant

make it difficult for the states to comply with the Federal Act.¹¹⁵ One is the time-consuming process of making the substantial changes necessary—both administratively and legislatively—to conform their current operations and state laws to those required under the Federal Act. Some states have found the guardian *ad litem* requirement to be a burdensome demand on their judicial systems.¹¹⁶ Other states are having difficulty with the definition of child abuse because their statutory definitions of abuse are not as comprehensive as the Federal Act requires.¹¹⁷

Questions of an individual's right to privacy and the confidentiality of records have been raised with regard to the establishment of central registries.¹¹⁸ States which have central registries use them to receive reports of suspected or known instances of abuse or neglect, establish a tracking system of abused and neglected children and their families, and provide a statistical profile of the incidence and social characteristics of those children and their families.¹¹⁹ Some experts believe that despite procedures in many states which require invalid reports to be expunged from the system, there exists the danger that they may not be. There also exists the possibility that unauthorized persons may gain access to the information in the system.¹²⁰

B. *Current Legislative Approaches to Child Abuse—the State Reporting Statutes*

The discovery of the bruised and weighted-down body of three-year-old Roxanne Felumero in the East River of New York City in 1969 set off a public furor when it was learned that just two months prior to her death her parents had been brought before the New York Family Court for alleged abuse and neglect. The judge had released the young girl back to her parent's custody.¹²¹ The inability of the courts to prove conclusively the criminal act of child abuse can lead to just this type of

category. For full eligibility of federal monies each of these states must submit requested documentation. 1977 *Senate Hearings*, *supra* note 5, at 397-98.

115. DHEW Regulations Implementing Pub. L. No. 93-247, 45 C.F.R. § 231; [1977 Documents Binder]; FAM. L. REP. (BNA) 101.0061.

116. 1977 *Senate Hearings*, *supra* note 5, at 182 (statement of Arabella Martinez).

117. 39 Fed. Reg. 43,936 (1974).

118. See text accompanying notes 289-98, *infra*.

119. See text accompanying notes 184-86, *infra*.

120. Sussman, *supra* note 83, at 312.

121. Grumet, *supra* note 62, at 310.

unfortunate situation. Protecting a child from abuse is a difficult task, since the victim of the abuse often will not—or cannot—testify against his or her assailant. Abuse usually takes place in the privacy of the home away from public scrutiny, and even when it is reported, it is difficult to prove in the absence of eyewitnesses. The need to discover and identify abused children is the primary reason for devising a case-finding tool such as the reporting laws.

In one form or another all fifty states and the District of Columbia have child abuse statutes.¹²² These laws encourage or require the report-

122. ALA. CODE tit. 27 § 20-25 (Interim Supp. 1975); ALASKA STAT. §§ 47.17.010 to 17.070 (1975 & Cum. Supp. 1977; ARIZ. REV. STAT. §§ 13-827, 13-842 (West Supp. 1957-1977), *to be renumbered* §§ 13-3619 to 13-3622 (effective Oct. 1, 1979); ARK. STAT. ANN. §§ 42-807 to 818 (1977); CAL. PENAL CODE §§ 11161.5 to 11162, 273a (Deering Supp. 1977); COLO. REV. STAT. §§ 19-10-101 to 10-115 (Cum. Supp. 1976); CONN. GEN. STAT. ANN. §§ 17-38a to 47 (1975 & Cum. Supp. 1978); DEL. CODE tit. 16, ch. 9 (Revised 1974); D.C. CODE §§ 2-161 to 183 (1973); FLA. STAT. §§ 827.07-.12, *as amended* by ch. 77-429, 1977 Fla. Sess. Law Serv.; GA. CODE ANN. §§ 74-109 to 111 (1973 & Cum. Supp. 1976); HAW. REV. STAT. § 350 (1976); IDAHO CODE §§ 16-1601 to 1630 (Cum. Supp. 1977); ILL. ANN. STAT. ch. 23, §§ 2051-2061 (Smith-Hurd Cum. Supp. 1977); IND. CODE ANN. §§ 12-3-4.1 to 3-4.1-6 (Burns 1973); IOWA CODE ANN. §§ 235A.1-.24 (West 1969 & Cum. Supp. 1977-1978); KAN. STAT. §§ 38-716 to 724 (1973 & Cum. Supp. 1977); KY. REV. STAT. § 199.335 (1977); LA. REV. STAT. ANN. § 14:403 (West 1974 & Cum. Supp. 1977); ME. REV. STAT. ANN. tit. 22, §§ 3851-3860 (West Supp. 1975 & Cum. Supp. 1977-1978); MD. ANN. CODE art. 27, § 35A (Replacement 1976 & Cum. Supp. 1977); MASS. GEN. LAWS ANN. ch. 119, §§ 51A-51F (West Cum. Supp. 1977-1978), *as amended* by 1977 Mass. Legis. Serv. 623 (West); MICH. COMP. LAWS ANN. §§ 722.621-.636 (West Cum. Supp. 1977-1978); MINN. STAT. ANN. § 626.556 (West Cum. Supp. 1978), *as amended* by 1977 Minn. Sess. Law Serv. 462-463 (West); MISS. CODE ANN. §§ 43-24-1 to 24-9 (Cum. Supp. 1977); MO. ANN. STAT. §§ 210.110-.165 (Vernon Cum. Supp. 1978), §§ 568.050-.060 (Vernon Special Pamphlet 1978, effective Jan. 1, 1979); MONT. REV. CODES ANN. §§ 10-1300 to 1322 (Supp. 1977); NEB. REV. STAT. § 28-1501 to 1508 (1975), *to be renumbered* §§ 28-1450 to 1457 (effective July 1, 1978); NEV. REV. STAT. §§ 200.501-508 (1977); N.H. REV. STAT. ANN. §§ 169:37-45 (Supp. 1975); N.J. STAT. ANN. §§ 9:6-8.8 to 8.73 (West 1976); N.M. STAT. ANN. §§ 13-14-2, 13-14-3, 13-14-14.1 to 14.2 (Replacement 1976); N.Y. SOC. SERV. LAW §§ 411-428 (McKinney 1976), *as amended* by chs. 423, 518 (Consol. 1977); N.C. GEN. STAT. §§ 110-115 to 122 (1975 & Cum. Supp. 1977); N.D. CENT. CODE §§ 50-25.1-01 to 25.1-14 (Supp. 1977); OHIO REV. CODE § 2151.42.1 (Anderson 1976); OKLA. STAT. ANN. tit. 21, §§ 843-848 (West Cum. Supp. 1977-1978); OR. REV. STAT. §§ 418.740-.775 (1977); PA. STAT. ANN. tit. 11, §§ 2201-2224 (Purdon Cum. Supp. 1977-1978); R.I. GEN. LAWS §§ 40-11-1 to 11-16 (1977); S.C. CODE §§ 20-310 to 310.6 (Cum. Supp. 1975); S.D. CODIFIED LAWS §§ 26-10-10 to 10-15 (1976); TENN. CODE ANN. § 37-1201 (1977); TEX. FAM. CODE tit. 2, §§ 34.01-.08, 35.04 (Vernon 1975 & Cum. Supp. 1978); UTAH CODE ANN. §§ 55-16-1 to 16-7 (1974 & Supp. 1977); VT. STAT. ANN. tit. 13, §§ 1351-1356 (Cum. Supp. 1977); VA. CODE §§ 63.1-248.1 to 248.17 (Cum. Supp. 1977); WASH. REV.

ing of suspected or known cases of child abuse. Many include criminal provisions to punish or rehabilitate those who abuse children and establish or authorize protective services for children.

(1). A SURVEY OF THE REPORTING STATUTES

The state reporting laws have undergone considerable change in the past five years. For analysis purposes, each of the state's reporting laws may be divided in thirteen basic areas of concern. These areas include: (1) a statement of purpose; (2) definition of abuse and neglect; (3) mandatory or permissive reporting of suspected cases of child abuse or neglect; (4) mandatory reporting to a medical examiner or coroner; (5) authorized reporting procedures; (6) immunity from civil or criminal prosecution for reporting; (7) sanctions for failure to report; (8) statutory abrogation of privileged communications; (9) temporary protective custody; (10) evidentiary use of color photographs and x-rays; (11) the central registry; (12) failure to provide medical care because of religious beliefs; and (13) the guardian *ad litem*. The degree of conformity, the extent of common agreement, the presence or absence of these thirteen elements, and the strengths and weaknesses of these enactments will be reviewed.¹²³

(a). *A statement of purpose.* The policy of a state regarding a specific law is usually found in an intent clause which defines the purpose sought to be served by the legislative act. In that statement, the legislature expresses the ultimate goals and objectives which it believes the law should achieve. While the purpose does not have the force of law behind it, it can serve as a guide for interpreting or resolving doubts created by language found within the law.

Forty-one states include purpose clauses in their reporting statutes,¹²⁴ all directed to the necessity of providing protection to the child

CODE ANN. §§ 26.44.010 to 44.080 (Supp. 1976); W. VA. CODE §§ 49-6-1 to 6-8, 49-6A-1 to 6A-10 (Cum. Supp. 1977); WIS. STAT. ANN. § 48.981 (Cum. Supp. 1977-1978); WYO. STAT. §§ 14-21, 14-28.7 to 28.15 (Interim Supp. 1977).

123. This article does not extensively cover the historical development of legislation in this area. For a thorough discussion of legislative history, see Paulsen, *supra* note 85, at 1.

124. ALA. CODE tit. 27, § 20(2) (Interim Supp. 1975); ALASKA STAT. § 47.17.010 (1975); ARIZ. REV. STAT. § 13-827 (West Supp. 1957-1977); COLO. REV. STAT. § 19-10-102 (Cum. Supp. 1976); CONN. GEN. STAT. ANN. § 17-38a (Cum. Supp. 1978); DEL. CODE tit. 16, § 901 (Revised 1974); D.C. CODE § 2-161 (1973); FLA. STAT. §

and for the prevention of further abuse. These states further provide for the use of protective services to children.¹²⁵ Twenty-nine states speak to the non-punitive intent of the law and the desire to preserve the family unit whenever possible.¹²⁶ Also present in purpose clauses are the kinds of community resources sought to be marshaled into action on behalf of abused children. New York calls for the establishment of a child protection service in each county to investigate reports and provide protection for the child and rehabilitation for the parents or person

827.07(2), *as amended* by ch. 77-429, 1977 Fla. Sess. Law Serv.; GA. CODE ANN. § 74-111(d) (Cum. Supp. 1976); IDAHO CODE § 16-1601 (Cum. Supp. 1977); ILL. ANN. STAT. ch. 23 § 2052 (Smith-Hurd Cum. Supp. 1977); IND. CODE ANN. § 12-3-4.1-1 (Burns 1973); IOWA CODE ANN. § 235A.1 (West 1969); KAN. STAT. § 38-716 (1973); KY. REV. STAT. § 199.335(1) (1977); LA. REV. STAT. ANN. § 14:403 A (West 1974); ME. REV. STAT. ANN. tit. 22 § 3851 (West Supp. 1975); MD. ANN. CODE art. 27, § 35A (Replacement 1976); MICH. COMP. LAWS ANN. § 722.621 (West Cum. Supp. 1977-1978); MINN. STAT. ANN. § 626.556(1) (West Cum. Supp. 1978); MONT. REV. CODES ANN. § 10-1300 (Supp. 1977); NEV. REV. STAT. § 200.501 (1977); N.H. REV. STAT. ANN. § 169:37 (Supp. 1975); N.J. STAT. ANN. § 9:6-8.8 (West 1976); N.M. STAT. ANN. § 13-14-2 (Replacement 1976); N.Y. SOC. SERV. LAW § 411 (McKinney 1976); N.C. GEN. STAT. § 110-116 (1975); N.D. CENT. CODE § 50-25.1-01 (Supp. 1977); OHIO REV. CODE ANN. § 2151.42.1 (Anderson 1976); OKLA. STAT. ANN. tit. 21, § 845 (Supp. 1977-1978); OR. REV. STAT. § 418.745 (1977); PA. STAT. ANN. tit. 11, § 2202 (Purdon Cum. Supp. 1977-1978); R.I. GEN. LAWS § 40-11-1 (1977); TENN. CODE ANN. § 37-1202 (1977); TEX. FAM. CODE tit. 2, § 34.05 (Vernon Cum. Supp. 1978); UTAH CODE ANN. § 55-16-1 (Supp. 1977); VT. STAT. ANN. tit. 13, § 7351 (Cum. Supp. 1977); VA. CODE § 63.1-248.1 (Cum. Supp. 1977); WASH. REV. CODE ANN. § 26.44.010 (Supp. 1976); W. VA. CODE § 49-6A-1 (Cum. Supp. 1977); WYO. STAT. § 14-21 (Interim Supp. 1977).

125. *Id.*

126. ALASKA STAT. § 47.17.010 (1975); CONN. GEN. STAT. ANN. § 17-38a (Cum. Supp. 1978); DEL. CODE tit. 16, § 901 (Revised 1974); D.C. CODE § 2-161 (1973); FLA. STAT. § 827.07(2), *as amended* by ch. 77-429, 1977 Fla. Sess. Law Serv.; GA. CODE ANN. § 74-111(d) (Cum. Supp. 1976); IDAHO CODE § 16-1601 (Cum. Supp. 1977); ILL. ANN. STAT. ch. 23, § 2052 (Smith-Hurd Cum. Supp. 1977); IOWA CODE ANN. § 235A.1 (West Cum. Supp. 1977-1978); KAN. STAT. § 38-716 (Cum. Supp. 1977); KY. REV. STAT. § 199.335 (1977); ME. REV. STAT. ANN. tit. 22, § 3851 (West Cum. Supp. 1975); MICH. COMP. LAWS ANN. § 722.621 (West Cum. Supp. 1977-1978); MINN. STAT. ANN. § 621.556(1) (West Cum. Supp. 1978); NEV. REV. STAT. § 200.501 (1977); N.H. REV. STAT. ANN. § 169.37 (Supp. 1975); N.M. STAT. ANN. § 13-14-2 (Replacement 1976); N.C. GEN. STAT. § 110-116 (1975); OHIO REV. CODE ANN. § 2151.42.1 (Anderson 1976); OR. REV. STAT. § 418.745 (1977); PA. STAT. ANN. tit. 11, § 2202 (Purdon Cum. Supp. 1977-1978); R.I. GEN. LAWS § 40-11-1 (1977); TENN. CODE ANN. § 37-1202 (1977); UTAH CODE ANN. § 55-16-1 (Supp. 1977); VT. STAT. ANN. tit. 13, § 1351 (Cum. Supp. 1977); VA. CODE § 63.1-248.1 (Cum. Supp. 1977); WASH. REV. CODE ANN. § 26.44.010 (Supp. 1976); W. VA. CODE § 49-6A-1 (Cum. Supp. 1977); WYO. STAT. § 14-21 (Interim Supp. 1977).

acting *in loco parentis*.¹²⁷ The Louisiana purpose clause directs that its reporting statute “be administered and interpreted to provide the greatest possible protection as promptly as possible for such children.”¹²⁸

(b). *Definition of abuse and neglect.* Since the inception of the first reporting laws in 1963, the definition of “abuse” has undergone considerable change. A “child” has been defined as any person under the age of 18 in forty-seven states,¹²⁹ under 17 in one state,¹³⁰ and under 16 in two states.¹³¹ New York, until recently, had a dual age requirement: it defined an “abused child” as a child under 16 and a “maltreated child” as a child under 18.¹³² Some states look to the mental or physical

127. N.Y. SOC. SERV. LAW § 411 (McKinney 1976).

128. LA. REV. STAT. ANN. § 14:403 (1974).

129. ALA. CODE tit. 27, § 20(1)(3) (Interim Supp. 1975); ARIZ. REV. STAT. § 13-842.01(F) (West Supp. 1957-1977); CAL. PENAL CODE § 272 (Deering Supp. 1977); COLO. REV. STAT. § 18-7-102(5) (Cum. Supp. 1976); CONN. GEN. STAT. ANN. § 17-38b (Cum. Supp. 1978); DEL. CODE tit. 16, § 902 (Revised 1974); D.C. CODE § 2-162 (1973); FLA. STAT. § 827.07(1)(a) (1976); GA. CODE ANN. § 74-111(a) (1953); HAW. REV. STAT. § 350-1 (1976); IDAHO CODE § 16-1601(c) (Cum. Supp. 1977); ILL. ANN. STAT. ch. 23, § 2053 (Smith-Hurd Cum. Supp. 1977); IND. CODE ANN. § 29-1-1-3 (Burns Cum. Supp. 1977); IOWA CODE ANN. § 235A.2(2) (West Cum. Supp. 1977-1978); KAN. STAT. § 38-722(b) (Cum. Supp. 1977); KY. REV. STAT. § 2.015 (1971); LA. REV. STAT. ANN. § 14.403 B(2) (Cum. Supp. 1977); ME. REV. STAT. ANN. tit. 22, § 3852 (West Supp. 1975); MD. ANN. CODE art. 27, § 35A(b)(2) (Cum. Supp. 1977); MASS. GEN. LAWS ANN. ch. 119, § 51A (West. Cum. Supp. 1977-1978); MICH. COMP. LAWS ANN. § 722.622(a) (West Cum. Supp. 1977-1978); MINN. STAT. ANN. § 260.015 (1971); MISS. CODE ANN. § 43-21-5 (Cum. Supp. 1977); MD. ANN. STAT. § 210.110 (Vernon Cum. Supp. 1978); MONT. REV. CODES ANN. § 10-1301(1) (Supp. 1977); NEV. REV. STAT. § 200.5011(1) (1977); N.H. REV. STAT. ANN. § 169:38 (Supp. 1975); N.J. STAT. ANN. § 9:6-8.9 (West 1976); N.M. STAT. ANN. § 13-14-3A (Replacement 1976); N.Y. ch. 518, §§ 1-2 (Consol. 1977); N.C. GEN. STAT. § 110-117(1) (Cum. Supp. 1977); N.D. CENT. CODE § 50-25.1-02(1) (Supp. 1977); OHIO REV. CODE ANN. § 2151.42.1 (Anderson 1976); OKLA. STAT. ANN. tit. 21, § 845 (Supp. 1977-1978); OR. REV. STAT. § 418.740(2) (1977); PA. STAT. ANN. tit. 11, § 2203 (Purdon Cum. Supp. 1977-1978); R.I. GEN. LAWS § 40-11-2 (1977); S.D. CODIFIED LAWS § 26-10-10 (1976); TENN. CODE ANN. § 37-1201 (1977); TEX. FAM. CODE tit. 2, § 11.01(1) (Vernon 1975); UTAH CODE ANN. §§ 55-16-1.5 (Supp. 1977); VT. STAT. ANN. tit. 1, § 173 (Cum. Supp. 1977); VA. CODE § 63.1-248.2 (Cum. Supp. 1977); WASH. REV. CODE ANN. § 26.44.020 (Supp. 1976); W. VA. CODE § 49-1-2 (Cum. Supp. 1977); WIS. STAT. ANN. § 48.02 (1957). NEB. REV. STAT. § 38.101 (1974) (provides that any person under the age of 19 is considered a minor).

130. S.C. CODE § 20-310.1(a) (Cum. Supp. 1975).

131. ALASKA STAT. tit. 47, ch. 17.070 (Cum. Supp. 1977); WYO. STAT. § 14-28.7(a)(ii) (Interim Supp. 1977).

132. N.Y. SOC. SERV. LAW §§ 412(1)-(2) (McKinney 1976). The New York legislature recently enacted a law which defines an abused and neglected child as being under the age of 18. N.Y. ch. 518, §§ 1-2 (Consol. 1977).

condition of a person, as well as to that person's age, when declaring a class of persons to be protected by the reporting law. Washington defines such a class as "any person under the age of 18 years," which "includes mentally retarded persons, regardless of age."¹³³ Another state includes in its statute "any crippled or otherwise physically or mentally handicapped child under 21 years who has suffered any wound, injury, disability, or condition of such a nature as to reasonably indicate abuse or neglect."¹³⁴

The term "abuse" has been given a wide-ranging meaning under the reporting statutes. There is much variation in the manner in which states have chosen to define abuse. The trend nationally has been in the direction of broadening the definition. In many instances it includes neglect,¹³⁵ acts of emotional abuse,¹³⁶ and the perpetration of sexual abuse or molestation.¹³⁷ A number of states qualify their definition of abuse by inserting the word "serious" prior to the phrase "physical injury."¹³⁸ The Colorado, Idaho, and Wyoming statutes define abuse in very explicit medical terms.¹³⁹ Other states, however, give a broad definition of what constitutes child abuse. Alaska defines "abuse" as "the infliction, by other than accidental means, of physical harm upon the body of a child."¹⁴⁰ States such as Nebraska also give a broad definition of abuse, but enumerate specific acts which include: "tortured, cruelly confined, or cruelly punished"; or "left unattended in

133. WASH. REV. CODE § 26.44.020(6) (Supp. 1976).

134. OHIO REV. CODE ANN. § 2151.42.1 (Anderson 1976).

135. See, e.g., ILL. ANN. STAT. ch. 23, § 2053 (Smith-Hurd Cum. Supp. 1977), which provides a definition of "neglect," as follows:

a failure to provide, by those responsible for the care and maintenance of the child, the proper and necessary support, education as required by law or medical or other remedial care, recognized under State law, other care necessary for the child's well-being; or abandonment by his parent, guardian or custodian; or subjecting a child to an environment injurious to the child's welfare.

136. The language of a number of statutes broadly construes "emotional abuse" as the endangering of the child's emotional well-being. See, e.g., KAN. STAT. § 38-722 (Cum. Supp. 1977); LA. REV. STAT. ANN. § 14:403B(3) (Cum. Supp. 1977).

137. Research in the area of sexual abuse has resulted in an increasing awareness of this form of physical abuse and the emotional impact it has on young children in particular. See Sussman, *supra* note 83, at 254.

138. N.D. CENT. CODE § 50.25.1-02(1) (Supp. 1977); PA. STAT. ANN. tit. 11, § 2203 (Purdon Cum. Supp. 1977-1978).

139. COLO. REV. STAT. § 19-10-103 (Cum. Supp. 1976); IDAHO CODE § 16-1602(a) (Cum. Supp. 1977); WYO. STAT. § 14-28.7(a)(ii)(B) (Interim Supp. 1977).

140. ALASKA STAT. § 47.17.070 (Cum. Supp. 1977).

a motor vehicle, if such minor child is 6 years of age or younger"; or "sexually abused."¹⁴¹

The Federal Act focuses attention on "child abuse and neglect" as a unified term and defines this singular phrase as "the physical or mental injury, sexual abuse, negligent treatment, or maltreatment of a child under the age of eighteen by a person who is responsible for the child's welfare under circumstances which indicate that the child's health or welfare is harmed or threatened."¹⁴² Nineteen states have followed the lead of the Federal Act in viewing abuse and neglect as conditions falling along a continuum of maltreatment of children.¹⁴³ This means that abuse, neglect, sexual abuse, and emotional deprivation are all considered forms of child maltreatment. When these factors of abuse are placed along a continuum, they tend to flow one into the other and lose their distinctive characteristics.¹⁴⁴ Such an approach makes it easier for social service personnel and the courts to interpret what the offense perpetrated against a child is on a case by case basis.¹⁴⁵ A neglected child may also be considered abused, depending upon the severity of injury involved. Sufficient harm may be evident in instances where the child suffers severe emotional deprivation, starvation, death by neglect, or even infant addiction to drugs due to the habit of the mother.¹⁴⁶

A number of states include in their reporting statutes a provision which recognizes that abuse may not be limited only to individual perpetrators.¹⁴⁷ To protect children from such institutional abuse, thirteen

141. NEB. REV. STAT. § 28-1501(3) (1975).

142. 42 U.S.C. § 5102 (Supp. V 1975).

143. COLO. REV. STAT. § 19-10-103(1)(a) (Cum. Supp. 1976); FLA. STAT. § 827.07(1)(b), *as amended by* ch. 77-429, 1977 Fla. Sess. Law Serv.; HAW. REV. STAT. § 350-1 (1976); KAN. STAT. § 38.722 (Cum. Supp. 1977); ME. REV. STAT. tit. 22, § 3851 (West Supp. 1975); MASS. GEN. LAWS ANN. ch. 119, § 51A (West Cum. Supp. 1977-1978); MONT. REV. CODES ANN. § 10-1301(2)(a)(b) (Supp. 1977); NEB. REV. STAT. § 28-1501(3) (1975); NEV. REV. STAT. § 200.5011(1) (1977); N.J. STAT. ANN. § 9:6-8.9(a)-(d) (1976); OKLA. STAT. ANN. tit. 21, § 845 (West Cum. Supp. 1977-1978); OR. REV. STAT. § 418.740(1) (1977); PA. STAT. ANN. tit. 11, § 2203 (Purdon Cum. Supp. 1977-1978); R.I. GEN. LAW § 40-11-2(2) (1977); S.D. CODIFIED LAWS ANN. § 26-10-10 (1976); TENN. CODE ANN. § 37-1202(16) (Supp. 1977); UTAH CODE ANN. § 55-16-1.5 (Supp. 1977); VA. CODE § 63.1-248.2(A) (Cum. Supp. 1977); WASH. REV. CODE ANN. § 26.44.020 (Supp. 1976).

144. Friedrich & Borniskin, *supra* note 40, at 199.

145. *Id.* at 200.

146. Sussman, *supra* note 83, at 262.

147. *See* FLA. STAT. § 827.07(6)(a), *as amended by* ch. 77-429, 1977 Fla. Sess.

states provide that when a government agency is accused of abusing a child an investigation must be conducted by a designated agency other than the one accused of committing the abusive act.¹⁴⁸

(c). *The mandatory or permissive reporting of suspected cases and neglect.* The early reporting statutes almost uniformly limited reporting of suspected instances of child abuse to physicians. Many of these statutes were not even mandatory.¹⁴⁹ Those states having permissive reporting statutes generally permitted a physician to make a report if he felt the need to do so. One writer has noted that in "these cases . . . the aim is more to protect the physician than the child."¹⁵⁰ From this it would appear that a physician could make a medical judgment his first concern, rather than the underlying social policy of the reporting statutes.¹⁵¹ The argument used by opponents of broad-based mandatory reporting rested on two points. First, the physician was usually the only person to see the child. Second, only a physician had the requisite medical training to distinguish injuries caused by abuse from those caused by accidental means.¹⁵² Later statutes uniformly made reporting mandatory for physicians.¹⁵³

The trend in defining child abuse has expanded the criteria for reportable situations as well as the list of professionals who are required to report. Medical practioners remain the most logical and responsible group to come in contact with children whose injuries require treatment. In recent years, the list of mandated reporters has grown steadily from

Law Serv., which provides: "Any report which alleges that an employee or agent of the department [of Social and Rehabilitative Services] acting in an official capacity, has committed an act of child abuse shall be investigated by the State Attorney in whose circuit the alleged act of child abuse occurred."

148. FLA. STAT. § 827.07(1)(b), *as amended by* ch. 77-429, 1977 Fla. Sess. Law. Serv.; HAW. REV. STAT. § 305-1 (1976); MASS. GEN. LAWS ANN. ch. 119, § 51A (West Cum. Supp. 1977-1978); MONT. REV. CODES ANN. § 10-1301(2)(a)-(b) (Supp. 1977); NEB. REV. STAT. § 28-1501(3) (1975); NEV. REV. STAT. § 200.5011(1) (1977); N.J. STAT. ANN. § 9:6-8.9(a)-(d) (West 1976); OR. REV. STAT. § 418.750 (1977); PA. STAT. ANN. tit. 11, § 2203 (Purdon Cum. Supp. 1977-1978); UTAH CODE ANN. § 55-16-3 (Supp. 1977); VT. STAT. ANN. tit. 13, § 1354 (Cum. Supp. 1977); VA. CODE § 63.1-248.3(A) (Cum. Supp. 1977); W. VA. CODE § 49-6A-2 (Cum. Supp. 1977).

149. Paulsen, *supra* note 85, at 7.

150. Daly, *supra* note 40, at 305.

151. *Id.*

152. Shepard, *The Abused Child and the Law*, 22 WASH. & LEE L. REV. 182, 191 (1965).

153. Fraser, *A Pragmatic Alternative to Current Legislative Approaches to Child Abuse*, 12 AM. CRIM. L. Q. 103, 109 (1974).

persons in the medical and related fields to almost everyone connected in some professional capacity with large numbers of children.¹⁵⁴ It has been shown that child abuse is often an *on-going* trauma and that other persons besides physicians will come into contact with it.¹⁵⁵ One survey has found physicians and hospitals not to be among the most prolific of reporters.¹⁵⁶ When they do come across instances of child abuse, it is only after the injuries have become serious enough to warrant emergency medical care.¹⁵⁷

Enlarging the class of reporters results in placing into the legislative mandate the moral obligation of all persons to come to the assistance of the protective services of the community where the child is located. Besides physicians, social service personnel,¹⁵⁸ teachers,¹⁵⁹ hospital interns and residents,¹⁶⁰ psychologists,¹⁶¹ osteopaths,¹⁶² police officers,¹⁶³

154. *Id.*

155. Grumet, *supra* note 62, at 305.

156. The National Clearinghouse on Child Abuse and Neglect, Children's Division of the American Humane Association, gathered information on abuse and neglect reports which were made to the mandated authorities by many agencies and individuals in the communities. Data on this aspect of the study were grouped as follows:

<i>Sources</i>	<i>Percentage of all reports</i>
Public and private social agencies, schools, school personnel, police, courts, "hotlines."	39.40%
Neighbors, friends, relatives, siblings.	40.60%
Hospitals, physicians, nurses, coroners, medical examiners.	9.70%
Others (not specified).	8.50%

1977 *House Hearings*, *supra* note 73, at 150.

157. *Id.*

158. Forty-two states presently specifically mandate social service personnel to report suspected or known cases of child abuse or neglect. *See, e.g.*, ALA. CODE tit. 27, § 21 (Interim Supp. 1975); ALASKA STAT. tit. 47, § 17.020(a)(3) (Cum. Supp. 1977); COLO. REV. STAT. § 19-10-104(2)(m) (Cum. Supp. 1976).

159. Forty-two states require that teachers report any suspected or known cases of child abuse or neglect. *See, e.g.*, ARK. STAT. ANN. § 42-808 (1977); CONN. GEN. STAT. ANN. § 17-38a (Cum. Supp. 1978); ME. REV. STAT. ANN. tit. 22, § 3853(1) (Cum. Supp. 1977-1978).

160. Thirty-nine states require that hospital interns and residents report suspected or known cases of child abuse and neglect. *See, e.g.*, CONN. GEN. STAT. ANN. § 17-38a (Cum. Supp. 1978); LA. REV. STAT. ANN. § 14:403 C (1) (West 1974).

161. Twenty states require that psychiatrists and psychologists report suspected

medical examiners and coroners,¹⁶⁴ hospitals,¹⁶⁵ clergymen,¹⁶⁶ and lawyers¹⁶⁷ are also mandated to report instances of child abuse. Twenty-six states require reporting by "any other person who has cause to believe" that abuse has occurred.¹⁶⁸ Some states provide for voluntary reports by

or known cases of child abuse or neglect. *See, e.g.*, DEL. CODE tit. 16, § 902 (Revised 1974); IOWA CODE ANN. § 235A.3(b) (Cum. Supp. 1977-1978).

162. Twenty-two states mandate that osteopaths report suspected or known cases of child abuse or neglect. *See, e.g.*, ARIZ. REV. STAT. § 13-842.01A (West Supp. 1957-1977); HAW. REV. STAT. tit. 20, § 350-1 (1976).

163. Only two states required reporting from law enforcement officials in 1967. The number increased to 14 in 1973. Sussman, *supra* note 83, at 272. Twenty-eight states now require law enforcement officials to report known or suspected cases of child abuse or neglect. *See, e.g.*, ILL. ANN. STAT. ch. 23, § 2054 (Smith-Hurd Cum. Supp. 1977); N.D. CENT. CODE § 50-25.1-03(1) (Supp. 1977).

164. Two states required coroners or medical examiners to report known or suspected cases of child abuse in 1967. The number increased to nine in 1973. Sussman, *supra* note 83, at 272. Twenty-four states presently require the reporting of known or suspected cases of child abuse or neglect by coroners or medical examiners. *See, e.g.*, FLA. STAT. § 827.07(4)(b), *as amended by* ch. 77-429, 1977 Fla. Sess. Law Serv.; OR. REV. STAT. § 418.740(3)(f) (1977).

165. Six states require hospitals to report suspected or known cases of child abuse or neglect. Other states indirectly require hospitals to report by mandating physicians on a hospital staff to report to the chief administrator of the hospital in which he is employed if a case of child abuse is discovered in the hospital. *See, e.g.*, CONN. GEN. STAT. ANN. § 17-38a(b)-(c) (Cum. Supp. 1978).

166. Clergymen are required to report known or suspected cases of child abuse or neglect in six states. *See, e.g.*, NEV. REV. STAT. § 200.502(2)(b) (1977).

167. Three states require that attorneys report suspected or known cases of child abuse or neglect. *See* NEV. REV. STAT. § 200.502(2)(d) (1977); OHIO REV. CODE ANN. § 2151.42.1 (Anderson 1976); OR. REV. STAT. § 418.740(3)(m) (1977).

168. ARIZ. REV. STAT. § 13-842.01 (West Supp. 1957-1977); CONN. GEN. STAT. ANN. § 17-38c (1975); DEL. CODE tit. 16, § 902 (Revised 1974); FLA. STAT. § 827.07(4), *as amended by* ch. 77-429, 1977 Fla. Sess. Law Serv.; IDAHO CODE § 16-1619 (Cum. Supp. 1977); ILL. ANN. STAT. ch. 23, § 2054 (Smith-Hurd Cum. Supp. 1977); IND. CODE ANN. § 12-3-4.1-2 (Burns 1973); KY. REV. STAT. § 199.335(2) (1977); MD. ANN. CODE art. 27, § 35A(e) (Replacement 1976); MONT. REV. CODES ANN. § 10-1304 (Supp. 1977); NEB. REV. STAT. § 28-1502 (1975); NEV. REV. STAT. § 200.502(3) (1977); N.H. REV. STAT. ANN. § 169:40 (Supp. 1975); N.J. STAT. ANN. § 9:6-8.10 (West 1976); N.M. STAT. ANN. § 13-14.1A (Replacement 1976); N.Y. SOC. SERV. LAW § 414 (McKinney 1976); N.C. GEN. STAT. § 110-118(a) (1975); N.D. CENT. CODE § 50-25.1-03(2) (Supp. 1977); OKLA. STAT. ANN. tit. 21, § 846 (West Cum. Supp. 1977-1978); R.I. GEN. LAWS § 40-11-3 (1977); S.C. CODE § 20-310.1(2) (Cum. Supp. 1975); TENN. CODE ANN. § 37-1203 (Supp. 1977); TEX. FAM. CODE tit. 2, § 34.01 (Vernon 1975); UTAH CODE ANN. § 55-16-2 (Supp. 1977); VT. STAT. ANN. tit. 13, § 1353 (Cum. Supp. 1977); WYO. STAT. § 14-28.8(a) (Interim Supp. 1977).

any person who has reason to suspect abuse or neglect.¹⁶⁹ One state provides that certain designated professional institutional reporters may make oral reports to department or institution heads.¹⁷⁰

(d). *Mandatory reporting to a medical examiner or coroner.* It has been only within the past few years that medical examiners or coroners have been required to receive reports on suspected instances of child abuse which result in death. In 1967, only two states required that reports be made to medical examiners or coroners.¹⁷¹ This number increased to nine states by 1973.¹⁷² At the present time, eleven states require that reports be transmitted to the local medical examiner or coroner in such instances.¹⁷³ The paucity of statutes requiring that reports be made to medical examiners prompted one commentator to note that even though "death ends the possibility of protecting the particular child, an investigation of the circumstances and the family may bring assistance to the remaining children."¹⁷⁴ A nearly uniform provision in these reporting statutes is the requirement that a medical examiner or coroner, upon receipt of an abuse case resulting in the death of the infant, forward all information to the police, state attorney, or responsible social services agency.¹⁷⁵ This procedure is aimed at ensuring that

169. See, e.g., IOWA CODE ANN. § 235A.3(2) (West Cum. Supp. 1977-1978), which provides that in addition to persons mandated to report, "any other person who believes that a child has had physical injury inflicted upon him as a result of abuse may [also] make a report. . . ."

170. VA. CODE § 63.1-248.3 (Cum. Supp. 1977), provides that if information on child abuse is received by a "teacher, staff member, resident, intern or nurse in the course of professional services in a hospital, school or similar institution," such person *may* "in place of a written report notify the head of the institution or department, who shall be required to make a report." This statute also provides that any other person who suspects a case of child abuse has occurred *may* make a complaint to the appropriate authorities.

171. Sussman, *supra* note 83, at 272.

172. *Id.*

173. ARK. STAT. ANN. § 42-809 (1977); COLO. REV. STAT. § 19-10-105 (Cum. Supp. 1976); FLA. STAT. § 827.07(4)(b), *as amended* by ch. 77-429, 1977 Fla. Sess. Law Serv.; KAN. STAT. § 38-721(b) (Cum. Supp. 1977-1978); MASS. GEN. LAWS ANN. ch. 119, § 51A (West Cum. Supp. 1977-1978); MINN. STAT. ANN. § 626.556(a) (West Cum. Supp. 1978); MO. ANN. STAT. § 210.115(5) (Vernon Cum. Supp. 1978); N.Y. SOC. SERV. LAW § 418 (McKinney 1976); PA. STAT. ANN. tit. 11, § 2210 (Purdon Cum. Supp. 1977-1978); W. VA. CODE § 49-6A-3 (Cum. Supp. 1977); WYO. STAT. § 14-28.9:1 (Interim Supp. 1977).

174. Paulsen, *supra* note 85, at 12.

175. See, e.g., FLA. STAT. § 827.07(4)(b), *as amended* by ch. 77-429, 1977 Fla. Sess. Law Serv., which provides:

child abuse deaths are promptly reported and recognized as such by the protective services of each community.

(e). *Authorized reporting procedures.* Many of the child abuse reporting statutes treat extensively the procedure to be followed by the state agency receiving a report. The primary receiving agencies involving instances of child abuse are the police, social services agencies, the juvenile courts, and the state attorney. In some states a choice in the order of contacting these agencies is provided to the reporter.¹⁷⁶ Twenty-six states provide that reports be made initially to law enforcement officials or police.¹⁷⁷ One state requires a report to be made to juvenile courts,¹⁷⁸ while seven other states provide that reports be made to the state attorney's office.¹⁷⁹ By far the largest recipients of reports are the

Any person required to report or investigate cases of suspected child abuse or maltreatment, who has cause to suspect that a child has died as a result of abuse or maltreatment, shall report that fact to the appropriate medical examiner. The medical examiner shall accept the report for investigation pursuant to § 406.11 and shall report his finding to the police, the appropriate State Attorney, and the department. Autopsy reports maintained by the medical examiner shall not be subject to the confidentiality requirement provided for in this section.

176. See, e.g., TENN. CODE ANN. § 37-1203 (1977), which provides that a reporter who suspects that an act of child abuse has occurred "shall report such harm immediately, by telephone or otherwise, to the judge having juvenile jurisdiction or to the county office of the sheriff or other law-enforcement official of the municipality where the child resides."

177. ALA. CODE tit. 27, § 21 (Interim Supp. 1975); ALASKA STAT. § 47.17.020(a)(c) (1975); CAL. PENAL CODE § 11161.5(a) (Deering Supp. 1977); COLO. REV. STAT. § 19-10-104(1) (Cum. Supp. 1976); CONN. GEN. STAT. ANN. § 17-38a(c) (Cum. Supp. 1978); DEL. CODE tit. 16, § 903 (Revised 1974); D.C. CODE § 2-161 (1973); GA. CODE ANN. § 74-111(b) (Cum. Supp. 1976); IDAHO CODE § 16-1619 (Cum. Supp. 1977); ILL. ANN. STAT. ch. 23, § 2057 (Smith-Hurd Cum. Supp. 1977); IND. CODE ANN. § 12-3-4.1-2 (Burns 1973); IOWA CODE ANN. § 235A.4(2) (West Cum. Supp. 1977-1978); KY. REV. STAT. § 199.335(3) (1977); LA. REV. STAT. ANN. § 14:403 D (1) (West 1974); MD. ANN. CODE art. 27, § 35A(d) (Replacement 1976); MINN. STAT. ANN. § 626.556(3) (West Cum. Supp. 1978); NEB. REV. STAT. § 28-1502 (1975); NEV. REV. STAT. § 200.502(1) (1977); OHIO REV. CODE ANN. § 2151.42.1 (Anderson 1976); OR. REV. STAT. § 418.755 (1977); S.C. CODE § 20-310.1(b) (Cum. Supp. 1975); TEX. FAM. CODE tit. 2, § 34.02 (Vernon Cum. Supp. 1978); UTAH CODE ANN. § 55-16-3 (Supp. 1977); WASH. REV. CODE ANN. § 26.44.030 (Supp. 1976); WIS. STAT. ANN. § 48.981(1) (Cum. Supp. 1977-1978); WYO. STAT. § 14-28.9(a) (Interim Supp. 1977).

178. KAN. STAT. § 38-717 (Cum. Supp. 1977).

179. IOWA CODE ANN. § 235A.4(6) (West Cum. Supp. 1977-1978); KAN. STAT. § 38-717 (Cum. Supp. 1977); MD. ANN. CODE art. 27, § 35A(d) (Replacement 1976); MONT. REV. CODES ANN. § 16-1304 (Supp. 1977); OKLA. STAT. ANN. tit. 21, § 846 (West Cum. Supp. 1977-1978); S.D. CODIFIED LAWS ANN. § 26-10-12 (1976); TENN. CODE ANN. § 37-1206(f) (Supp. 1977).

social services agencies. These agencies are charged by law in forty-eight states to receive reports on suspected abuse and neglect cases.¹⁸⁰

The designation of the receiving agency is one of the most critical elements of any reporting statute. The nature and orientation of the agency first receiving the report will often determine the governmental response to child abuse. An overwhelming majority of the reporting statutes emphasize the importance of urgent action in reporting suspected injury.¹⁸¹ The next step depends upon what action is taken by the responsible agency by way of investigating a reported case of child abuse. The speed with which it acts, how responsibly it provides service,

180. ALASKA STAT. § 47.17.020(a) (1975); ARIZ. REV. STAT. § 13-842.01(A) (West Supp. 1957-1977); ARK. STAT. ANN. § 42-807(e) (1977); CAL. PENAL CODE § 11161.5(a) (Deering Supp. 1977); COLO. REV. STAT. § 19-10-104(1) (Cum. Supp. 1976); CONN. GEN. STAT. ANN. § 17-38a(c) (Cum. Supp. 1978); DEL. CODE tit. 16, § 903 (Revised 1974); D.C. CODE § 2-161 (1973); FLA. STAT. § 827.07(4)-(5), *as amended by* ch. 77-429, 1977 Fla. Sess. Law Serv.; GA. CODE ANN. § 74-111(b) (Cum. Supp. 1976); HAW. REV. STAT. § 350-1 (1976); ILL. ANN. STAT. ch. 23, § 2054 (Smith-Hurd Cum. Supp. 1977); IND. CODE ANN. § 12-3-4.1-2 (Burns 1973); IOWA CODE ANN. § 235A.4(2) (West Cum. Supp. 1977-1978); KAN. STAT. § 38-717 (Cum. Supp. 1977); LA. REV. STAT. ANN. § 14:403 D (1) (Cum. Supp. 1977); ME. REV. STAT. ANN. tit. 22, § 3853(1) (Cum. Supp. 1977-1978); MD. ANN. CODE art. 27, § 35A(d) (Replacement 1976); MASS. GEN. LAWS ANN. ch. 119, § 51A (West Cum. Supp. 1977-1978); MICH. COMP. LAWS ANN. § 722.623(1) (West Cum. Supp. 1977-1978); MINN. STAT. ANN. § 626.556(3) (West Cum. Supp. 1978); MISS. CODE ANN. § 43-21-11 (Cum. Supp. 1977); MO. ANN. STAT. § 210.115 (Vernon Cum. Supp. 1978); MONT. REV. CODES ANN. § 10-1304 (Supp. 1977); NEB. REV. STAT. § 28-1504 (1975); NEV. REV. STAT. § 200.502(1) (1977); N.H. REV. STAT. ANN. § 169:41 (Supp. 1975); N.J. STAT. ANN. § 9:6-8.11 (West 1976); N.M. STAT. ANN. § 13-14-14.1 (Replacement 1976); N.Y. SOC. SERV. LAW § 414 (McKinney 1976); N.C. GEN. STAT. § 110-118(a) (1975); N.D. CENT. CODE § 50-25.1-04 (Supp. 1977); OHIO REV. CODE ANN. § 2151.42.1 (Anderson 1976); OKLA. STAT. ANN. tit. 21, § 846 (West Cum. Supp. 1977-1978); OR. REV. STAT. § 418.755 (1977); PA. STAT. ANN. tit. 11, § 2206 (Purdon Cum. Supp. 1977-1978); R.I. GEN. LAWS § 40-13.1-3(1) (1977); S.C. CODE § 20-310.1(b) (Cum. Supp. 1975); S.D. CODIFIED LAWS ANN. § 26-10-12 (1976); TENN. CODE ANN. § 37-1203 (Supp. 1977); TEX. FAM. CODE tit. 2, § 34.02 (Vernon Cum. Supp. 1978); UTAH CODE ANN. § 55-16-3 (Supp. 1977); VT. STAT. ANN. tit. 13, § 1354 (Cum. Supp. 1977); VA. CODE § 63.1-248.6(A) (Cum. Supp. 1977); WASH. REV. CODE ANN. § 26.44.030 (Supp. 1976); W. VA. CODE § 49-6A-5 (Cum. Supp. 1977); WIS. STAT. ANN. § 48.981(1) (Cum. Supp. 1977-1978); WYO. STAT. § 14-28.9(a) (Interim Supp. 1977).

181. Language typical of these statutes may be found in the Michigan reporting statute. MICH. COMP. GEN. LAWS ANN. § 722.623(a) (West Cum. Supp. 1977-1978) provides that a mandated reporter "who has reasonable cause to suspect child abuse or neglect [shall] immediately, by telephone or otherwise . . . make an oral report, or cause an oral report to be made. . . ."

and its interpretation of what is expected of it bear directly on the degree of protection which the reporting statute makes available to abused children.

The immense importance of these two considerations is acknowledged by one commentator:

This is the most sensitive area of the whole discussion of reporting legislation. Yet, analysis shows that this is the most confused in terms of legislative action. A critical determination for the lawmakers is the decision about which resource to designate for receiving reports of child abuse. On this important decision rests the effectiveness of the reporting law with respect to achieving the appropriate goals. The right choice will bring into play the appropriate resources. A poor, or bad choice may produce results not contemplated by the law. It is possible, therefore, for the legislative intent to fail if the tools prescribed to accomplish the goal are inadequate or unsuited for the job.¹⁸²

A consensus among experts in the medical, legal, and social fields concludes that the existing social services agencies or more specialized offices of child protective services within these agencies should be responsible for receiving reports.¹⁸³ This preference is based upon the assumption that some type of protective service or treatment will be provided once the initial report is made.

A typical statute requiring reports to be made to a receiving agency calls for an oral report first to be made, either in person or by telephone.¹⁸⁴ A follow-up written report may be required if the receiving agency requests it.¹⁸⁵ This dual-use reporting procedure allows for speedier attention to the child's problem yet offers a permanent record which

182. DeFrancis, *The Status of Child Protective Services*, in *HELPING THE BATTERED CHILD & HIS FAMILY* 127, 140 (Kempe & Helfer eds. 1972). See also Sussman, *supra* note 83, at 280.

183. Sussman, *supra* note 83, at 285.

184. ARK. STAT. ANN. § 42-812(b) (1977) provides that such reports include the names and addresses of the child and his parents or other persons responsible for his care, if known; the child's age, sex, and race; the nature and extent of the child's injuries, sexual abuse or neglect, including any evidence of previous injuries, sexual abuse or neglect, if known; the composition of the family; the source of the report; the person making the report, his occupation and where he can be reached; and the action taken by the reporting source.

185. See, e.g., FLA. STAT. § 827.07(5), *as amended by* ch. 77-429, 1977 Fla. Sess. Law Serv.; MICH. COMP. GEN. LAWS ANN. § 722.623(1)-(5) (West Cum. Supp. 1977-1978).

can be relied upon during the investigation. The oral report is usually restricted to the essential facts necessary for the receiving agency to gauge whether a condition of child abuse or neglect exists.¹⁸⁶ Being unencumbered by an overwhelming amount of paperwork, the receiving agency is able to screen the reports coming in for likely cases of abuse requiring immediate attention. The amount of time saved in processing is another key factor which allows for a quick response in emergency situations. A number of statutes provide 24-hour telephone monitoring service seven days a week to receive (usually toll free) reports of suspected abuse.¹⁸⁷

(f). *Immunity from civil or criminal prosecution for reporting.* An essential element in the success of a reporting statute is the active co-operation and participation of those mandated by it to report known or suspected cases of abuse or neglect. Civil and criminal immunity are offered by the vast majority of reporting statutes.¹⁸⁸ It would be wholly unrealistic to expect such active co-operation without some degree of immunity from criminal and civil prosecution. Commentators agree that there is need for some type of immunity to protect mandated reporters from prosecution.¹⁸⁹ To encourage those individuals not mandated to report, it has been urged that immunity should be extended to them, as well.¹⁹⁰

The Federal Act requires that reporting statutes include an immunity provision "for persons reporting instances of child abuse and neglect from prosecution, under any state or local law, arising out of such reporting."¹⁹¹ "Good faith clauses" in immunity provisions have been used by state legislatures to ensure that reports are not made maliciously.¹⁹² This good faith requirement is strengthened in fourteen states

186. Child protective agencies follow a fairly standard procedure in handling cases. There is an initial intake process that involves limited screening and case assignment within the agency. During the intake process, the social service worker may decide that no further action can be taken; the report may not present sufficient information to be investigated—such as a report that does not identify the name and address of the family of the allegedly abused child.

187. See, e.g., FLA. STAT. § 827.07(7), as amended by ch. 77-429, 1977 Fla. Sess. Law Serv.; IOWA CODE ANN. § 235A(1)-(3) (West Cum. Supp. 1977-1978).

188. Fraser, *supra* note 153, at 111.

189. See, e.g., Grumet, *supra* note 62, at 306.

190. Paulsen, *The Law and Abused Children*, in *THE BATTERED CHILD* 174 (Helfer & Kempe eds., 2d ed. 1974).

191. 42 U.S.C. § 5103(b)(2)(A) (Supp. V 1975).

192. ARIZ. REV. STAT. § 13-842.01(D) (West Cum. Supp. 1957-1977). The Arizona statute provides:

by the inclusion of a "presumption of good faith" in their statutes.¹⁹³ Such a presumption places the burden of proving lack of good faith upon the instigator of any suit.

The medical profession, a special target group in the law, thinks itself particularly vulnerable to lawsuits without such protection.¹⁹⁴ The threat or even remote possibility of long and drawn-out legal battles inhibits necessary reporting. Thus, the inclusion of immunity provides some freedom to physicians from fear of retaliation by angry parents. One commentator has noted that such immunity provisions may be beneficial to the public in general and to physicians in particular "simply because they exist and can be publicized."¹⁹⁵ Such a provision may also tend to discourage lawsuits by plaintiffs hoping to gain financial reward over their own wrongdoing, should insufficient proof be offered at trial to convict them.

(g). *Sanctions for failure to report.* Sanctions exacted against a mandated reporter who fails to report a case of child abuse are included in the reporting statutes of many states. Thirty-three states at present impose some form of penal sanctions or fines upon those persons who are mandated to report instances of child abuse but willfully fail to do so.¹⁹⁶ The criminal penalties imposed upon those who fail to report range

Anyone participating in the making of reports required under the provisions of this section, or anyone participating in a judicial proceeding resulting from such reports, shall be immune from any civil or criminal liability by reason of such action unless such person acted with malice or unless such person has been charged with or is suspected of abusing or neglecting the child or children in question.

See also ALASKA STAT. tit. 47, § 17.050 (1975); CONN. GEN. STAT. ANN. § 17-38a(h) (Cum. Supp. 1978); HAW. REV. STAT. § 350-1 (1976).

193. ALA. CODE tit. 27, § 23 (Interim Supp. 1975); ARK. STAT. ANN. § 42-814 (1977); COLO. REV. STAT. § 19-10-110 (Cum. Supp. 1976); FLA. STAT. § 827.07(10), as amended by ch. 77-429, 1977 Fla. Sess. Law Serv.; ILL. ANN. STAT. ch. 23, § 2059 (Smith-Hurd Cum. Supp. 1977); ME. REV. STAT. ANN. tit. 22, § 3856 (West Supp. 1975); MICH. COMP. LAWS ANN. § 722.625 (West Cum. Supp. 1977-1978); MISS. CODE ANN. § 43-21-11 (Cum. Supp. 1977); N.M. STAT. ANN. § 13-14-14.2B (Replacement 1976); N.Y. SOC. SERV. LAW § 419 (McKinney 1976); N.D. CENT. CODE § 50-25.1-09 (Supp. 1977); PA. STAT. tit. 11, § 2211 (Purdon Cum. Supp. 1977-1978); TENN. CODE ANN. § 37-1210 (Supp. 1977); WYO. STAT. § 14-28.11 (Interim Supp. 1977).

194. Paulsen, *supra* note 85, at 31.

195. *Id.* at 32.

196. ALA. CODE tit. 27, § 25 (Interim Supp. 1975); ARIZ. REV. STAT. § 13-842.01(D) (West Supp. 1957-1977); ARK. STAT. ANN. § 42-816(a) (1977); CAL. PENAL CODE § 11162 (Deering Supp. 1977); CONN. GEN. STAT. ANN. § 17-38a(b) (Cum. Supp. 1978); DEL. CODE tit. 16, § 908 (Revised 1974); FLA. STAT. § 827.07(14)(a), as amended

from five days in jail¹⁹⁷ to one year in prison.¹⁹⁸ fines may also be exacted against willful violators. These range from \$25¹⁹⁹ to \$1,000.²⁰⁰ One commentator believes that it is not statutorily prudent to expose one's professional judgment to the ravages of criminal prosecution, even though such sanctions are placed in the context of a civil statute.²⁰¹ He believes that such a penalty provision is virtually unenforceable and, as such, is useless.²⁰² This is highlighted by the fact that regardless of the severity of the penalty, action against the physician does little to aid the abused child.

The reporting statutes reflect a difference in philosophy regarding how best to encourage persons required to report to make reports. One philosophy advocates the inclusion of a penalty clause in the belief that no action can be mandated by law without also providing a penalty for failure to comply therewith.²⁰³ Proponents of the other philosophy believe that the main problem is one of education. Their argument is that when people are made aware of the extent of the problem, and are informed that they are mandated to report, the problem will solve itself.

A mandated reporter who willfully fails to report an instance of child abuse may be liable for damages in a civil suit.²⁰⁴ *Robinson v.*

by ch. 77-429, 1977 Fla. Sess. Law Serv.; IND. CODE ANN. § 12-3-4.1-2(b) (Burns 1973); IOWA CODE ANN. §235A.9(1) (West Cum. Supp. 1977-1978); KAN. STAT. § 38-720 (Cum. Supp. 1977); LA. REV. STAT. ANN. § 14:403 I (West 1974); ME. REV. STAT. ANN. tit. 22, § 3856 (West Supp. 1975); MASS. GEN. LAWS ANN. ch. 119, § 51A (West Cum. Supp. 1977-1978), *as amended by* 1977 Mass. Legis. Serv. 623 (West); MO. ANN. STAT. § 210.165 (Vernon Cum. Supp. 1978); NEB. REV. STAT. § 28-1508 (1975); NEV. REV. STAT. § 200.507 (1977); N.H. REV. STAT. ANN. § 169:45 (Supp. 1975); N.J. STAT. ANN. § 9:6-8.14 (West 1976); N.M. STAT. ANN. § 13-14-14.1C (Replacement 1976); N.Y. SOC. SERV. LAW § 420(1) (McKinney 1976); N.D. CENT. CODE § 50-25.1-13 (Supp. 1977); OKLA. STAT. ANN. tit. 21, § 846 (West Cum. Supp. 1977-1978); PA. STAT. ANN. tit. 11, § 2212 (Purdon Cum. Supp. 1977-1978); S.C. CODE § 20-310.5 (Cum. Supp. 1975); S.D. CODIFIED LAWS § 26-10-10 (1976); TENN. CODE ANN. § 37-1212 (Supp. 1977); TEX. FAM. CODE tit. 2, § 34.07 (Vernon Cum. Supp. 1978); UTAH CODE ANN. § 55-16-6 (1974); VT. STAT. ANN. tit. 13, § 1353 (Cum. Supp. 1977); VA. CODE § 63.1-248.3 (Cum. Supp. 1977); WASH. REV. CODE ANN. § 26.44.080 (Supp. 1976); W. VA. CODE § 49-6A-8 (Cum. Supp. 1977); WIS. STAT. ANN. § 48.981(3) (Cum. Supp. 1977-1978).

197. See, e.g., KAN. STAT. § 38-720 (Cum. Supp. 1977).

198. See, e.g., MO. ANN. STAT. § 210.165 (Vernon Cum. Supp. 1978).

199. *Id.*

200. N.M. STAT. ANN. § 13-14-14.1(C) (Replacement 1976).

201. Shepard, *supra* note 152, at 192.

202. *Id.*

203. See McCoid, *supra* note 81, at 27.

204. Paulsen, *supra* note 85, at 36. Paulsen notes that "it seems likely that report-

*Wical*²⁰⁵ concerned a suit brought on behalf of a child against four doctors and the local police for failure to report and investigate the report adequately. The child had been taken to the defendant doctors on a number of occasions for treatment of injuries later shown to have been the result of abuse.²⁰⁶ The doctors acknowledged that they surmised the injuries to have been caused by such abuse. Nevertheless, they allowed the child to be returned to his mother after each visit for treatment. The suit was based on the theory of negligence per se. It was argued that the defendants had a statutory duty to report all known or suspected cases of child abuse or neglect to the proper authorities. The injured child alleged that the doctors breached their legally mandated duty to report and that he was a member of the class intended by the legislature to be protected by the statute. Prior to trial, the defendants agreed to pay \$600,000 as a settlement to the child.

In *Landeros v. Flood*,²⁰⁷ a guardian *ad litem*²⁰⁸ brought suit on behalf of a child against a physician and a hospital for negligently failing to diagnose her abused condition and for negligently failing to report her injuries to the proper authorities. As a result of such negligence, it was alleged, she suffered permanent physical injuries and mental distress. California's reporting statute required physicians to report instances of physical injuries to children which appear to have been inflicted by other than accidental means.²⁰⁹ In addition to the common law negligence, the plaintiff alleged failure to comply with the mandatory reporting laws.

ing statutes which require reporting and which carry criminal penalties create a cause of action in favor of infants who suffer abuse after a physician has failed to make a report respecting earlier abuse brought to his attention."

One state even provides for punitive damages. MINN. STAT. ANN. § 626.556(5) (Cum. Supp. 1978). The Minnesota statute provides for punitive damages being exacted against a person who either willfully or recklessly makes a false report under the statute, as well as for actual damages in a civil suit.

205. C.A. No. 37607 (Cal. Sup. Ct.) (San Luis Obispo, filed Sept. 4, 1970).

206. The child had whip marks on his back, puncture wounds in the neck, and burned finger tips. He was found with strangulation marks and was not breathing. Even though his breathing was restored, the brain had been without oxygen for so long that he became mentally retarded due to extensive brain damage. TIME, Nov. 20, 1972, at 74 (col. 2).

207. 17 Cal. 3d 399, 551 P.2d 389, 131 Cal. Rptr. 69 (1976).

208. For a discussion of the responsibilities of a guardian *ad litem*, see text accompanying notes 323-29, *infra*.

209. CAL. PENAL CODES § 11161.5 (Deering Supp. 1977).

The plaintiff appealed an order dismissing her complaint to the California Supreme Court. The first question the court addressed was whether the physician should be held to a standard of care which included knowing how to diagnose and treat the "battered child syndrome."²¹⁰ Citing *People v. Jackson*,²¹¹ the court stated that testimony of a physician identifying the battered child syndrome was admissible.²¹² The court recognized that the battered child syndrome had become an accepted medical diagnosis;²¹³ however, it did not possess the requisite medical knowledge to render a decision, as a matter of law, on the issue.²¹⁴ The court stated that the question was one of fact and must be based on expert testimony.²¹⁵

The defendants contended that the injuries suffered by the child after her release were not proximately caused by their failure to diagnose and report her condition.²¹⁶ However, the court held that proximate cause was a question of fact and turned on whether the defendants could reasonably have foreseen further injury to the child.²¹⁷

The court went on to find that the plaintiff's allegation of statutory negligence for failure to report was but an alternative theory of recovery for a single cause of action.²¹⁸ The mandatory reporting statute was strictly construed by the court: to constitute a violation of the statute it must actually have appeared to the physician that the child had been abused. For the plaintiff to prevail on the count of statutory negligence, she must prove that "defendant Flood actually observed her injuries and formed the opinion they were intentionally inflicted on her."²¹⁹

Such a subjective standard requiring actual knowledge in order to show statutory negligence makes a plaintiff's case more difficult to prove. An argument can be made for the inclusion of an objective standard in the penalty clause of a reporting statute.²²⁰ Simply put, the subjective standard will vitiate the intent of child abuse legislation by

210. 551 P.2d at 393.

211. 18 Cal. App. 3d 504, 95 Cal. Rptr. 919 (4th Dist. Ct. App. 1971).

212. 551 P.2d at 393.

213. *Id.*

214. *Id.* at 394.

215. *Id.*

216. *Id.* at 395.

217. *Id.*

218. *Id.* at 396.

219. *Id.* at 397-98.

220. Note, *Negligence—Malpractice—Physician's Liability for Failure to Diagnose and Report Child Abuse*, 23 WAYNE L. REV. 1187, 1198 (1977).

ensuring that any harm suffered by a child in violation of the statute will give rise to a viable claim for civil damages.

(h). *Statutory abrogation of privileged communications.* In many instances of child abuse, the only eyewitnesses are the parents and the child, and the child may either be too young or too intimidated to testify.²²¹ To encourage the disclosure of evidence of abuse, many of the reporting statutes abrogate a number of privileges pertaining to the exclusion of confidential communications. A typical statutory exception provides:

The physician-patient privilege, husband-wife privilege, or any privilege except the attorney-client privilege . . . provided for or covered by law, both as they relate to the competency of the witness and to the exclusion of confidential communications, shall not pertain in any civil or criminal litigation in which a child's neglect, dependency, abuse or abandonment is in issue or in any judicial proceedings resulting from a report submitted pursuant to this section.²²²

The privileges given to the physician-patient and husband-wife relationships fall by the wayside when a statutory exception abrogates them.

One commentator has noted that the physician-patient privilege did not exist at common law and never existed in the United Kingdom, contrary to what was generally believed.²²³ This evidentiary privilege was not established in the United States until 1828.²²⁴ A small minority of states retain the privileged status of confidential communications in any professional or personal relationship even when the communication involves child abuse or neglect.²²⁵ At the present time, forty-three states have enacted legislation waiving this privilege,²²⁶ which is an increase of

221. See text accompanying notes 67-78, *supra*.

222. FLA. STAT. § 827.07(10), *as amended by* ch. 77-429, 1977 Fla. Sess. Law Serv.

223. Sussman, *supra* note 83, at 297.

224. *Id.*

225. These states are Georgia and Maine.

226. ALA. CODE tit. 27, § 24 (Interim Supp. 1975); ALASKA STAT. § 47.17.060 (1975); ARIZ. REV. STAT. § 13-842.01(D) (West Supp. 1957-1977); ARK. STAT. ANN. § 42-815 (1977); CAL. PENAL CODE § 11161.6 (Deering Supp. 1977); DEL. CODE tit. 27, § 907 (Revised 1974); D.C. CODE § 2-165 (1973); FLA. STAT. § 827.07(11), *as amended by* ch. 77-429, 1977 Fla. Sess. Law Serv.; HAW. REV. STAT. § 350-5 (1976); IDAHO CODE § 16-1601 (Cum. Supp. 1977); ILL. ANN. STAT. ch. 23, § 2060 (Smith-Hurd Cum. Supp. 1977); IND. CODE ANN. § 12-3-4.1-5 (Burns 1973); IOWA CODE ANN. 235A.8 (West Cum. Supp. 1977-1978); KY. REV. STAT. § 199.335(7) (1977); LA. REV. STAT. ANN. §

nine states since 1968.²²⁷

Even without the existence of such a statutory exception, it is doubtful whether a parent could invoke the child patient's privilege (on the theory that the rights of a minor vest in its parents), particularly when the privilege is used as a shield for the person accused of injuring the child in the first place.²²⁸ Another reason why a court would probably disallow the privilege is the fact that such a privilege is meant to ensure that the best interests of the child be maintained. Allowing the privilege to stand would not work to the child's best interest.²²⁹

The Supreme Court of Washington, in *State v. Fagalde*,²³⁰ ruled on the applicability of conflicting state statutes as to whether psychiatrist-patient communications were considered privileged pertaining to evidence entered at trial. The evidence at issue stated that the defendant had revealed his hostility to the abused child and that he had physically assaulted the child. The young boy had been taken to a nearby hospital where an examination revealed that he had suffered a broken leg. Before this incident took place, the defendant had twice sought counseling at a mental health center and had spoken of his hostility with a psychologist. The defendant argued on appeal that there was a statute which maintained the confidentiality of the psychiatrist-patient relationship.²³¹ The court rejected the defendant's argument

14:403 F (West 1974); ME. REV. STAT. ANN. tit. 22, § 3856-A (West Cum. Supp. 1977-1978); MD. ANN. CODE art. 27, § 35A(h)(2) (Replacement 1976); MASS. GEN. LAWS ANN. ch. 119, § 51A (West Cum. Supp. 1977-1978); MICH. COMP. LAWS ANN. § 722.631 (West Cum. Supp. 1977-1978); MINN. STAT. ANN. § 626.556 (West Cum. Supp. 1978); MO. ANN. STAT. § 210.140 (Vernon Cum. Supp. 1978); MONT. REV. CODES ANN. § 10-1307 (Cum. Supp. 1977); NEB. REV. STAT. § 28-1503 (1975); NEV. REV. STAT. § 200.506 (1977); N.H. REV. STAT. ANN. § 169.43 (Supp. 1975); N.J. STAT. ANN. § 9:6-8.46 (West 1976); N.M. STAT. ANN. § 13-14-4.2A (Replacement 1976); N.C. GEN. STAT. § 110-121 (1975); N.D. CENT. CODE § 50-25.1-10 (Cum. Supp. 1977); OHIO REV. CODE ANN. § 2151.42.1 (Anderson 1976); OKLA. STAT. ANN. tit. 21, § 848 (West Cum. Supp. 1977-1978); OR. REV. STAT. § 418.775 (1977); PA. STAT. ANN. tit. 11, § 2222(2) (Purdon Cum. Supp. 1977-1978); R.I. GEN. LAWS § 40-11-11 (1977); S.C. CODE § 20-310.3 (Cum. Supp. 1975); S.D. CODIFIED LAWS § 26-10-15 (Supp. 1977); TENN. CODE ANN. § 37-1211 (Supp. 1977); TEX. FAM. CODE tit. 2, § 34.04 (Vernon 1975); UTAH CODE ANN. § 55-16-5 (1974); VA. CODE § 63.1-248.11 (Cum. Supp. 1977); WASH. REV. CODE ANN. § 26.44.060(3) (Supp. 1976); W. VA. CODE § 49-6A-7 (Cum. Supp. 1977); WYO. STAT. § 14-28.12 (Interim Supp. 1977).

227. Daly, *supra* note 40, at 330.

228. Sussman, *supra* note 83, at 298.

229. Krause, *supra* note 106, at 259.

230. 85 Wash. 2d 730, 539 P.2d 86 (1975).

231. 539 P.2d at 88-89.

that confidential communications between the perpetrator and a psychologist—a doctor, or a mental health employee—“are protected from disclosure and privileged in a judicial proceeding according to the terms of the applicable statutes.”²³² The court interpreted the intent of the legislature as having attached a greater importance to the “reporting of incidents of child abuse and the prosecution of perpetrators than to counseling and treatment of persons whose mental or emotional problems cause them to inflict such abuse.”²³³

Such an exception to the privilege may also act to relieve the medical profession from legal or ethical restrictions against revealing confidential information. One commentator has noted that the physician-patient waiver “is likely to encourage reporting from a profession which has a history steeped with protection of confidential communications.”²³⁴

There exists in many states a privilege similar to that of physician-patient between a husband and wife. Neither may divulge information damaging to the other in any criminal procedure without the release of the spouse against whom the evidence is being given. As this privilege existed at common law, it must be specifically excluded by statute.²³⁵ The number of states allowing the waiver of this privilege has steadily increased from only twenty in 1968²³⁶ to thirty-two in 1974.²³⁷ Thirty-nine states now statutorily abrogate the privilege.²³⁸ The reason for this

232. *Id.* at 90.

233. *Id.*

234. Daly, *supra* note 40, at 330.

235. *Id.* at 331.

236. Sussman, *supra* note 83, at 299.

237. *Id.* at 299.

238. ALA. CODE tit. 27, § 24 (Interim Supp. 1975); ALASKA STAT. § 47.17.060 (1975); ARIZ. REV. STAT. § 13-842.01(D) (West Supp. 1957-1977); ARK. STAT. ANN. § 42-815 (1977); DEL. CODE tit. 27, § 907 (Revised 1974); D.C. CODE § 2-165 (1973); FLA. STAT. § 827.07(11), *as amended by* ch. 77-429, 1977 Fla. Sess. Law Serv.; HAW. REV. STAT. § 350-5 (1976); IDAHO CODE § 16-1601 (Cum. Supp. 1977); ILL. ANN. STAT. ch. 23, § 2060 (Smith-Hurd Cum. Supp. 1977); IND. CODE ANN. § 12-3-4.1-5 (Burns 1973); IOWA CODE ANN. § 235A.8 (West Cum. Supp. 1977-1978); KY. REV. STAT. § 199.335(7) (1977); LA. REV. STAT. ANN. § 14:403 F (West 1974); ME. REV. STAT. ANN. tit. 22, § 3856-A (West Cum. Supp. 1977-1978); MASS. GEN. LAWS ANN. ch. 119, § 51A (West Cum. Supp. 1977-1978); MICH. COMP. LAWS ANN. § 722.631 (West Cum. Supp. 1977-1978); MINN. STAT. ANN. § 626.556 (West Cum. Supp. 1978); MO. ANN. STAT. § 210.140 (Vernon Cum. Supp. 1978); MONT. REV. CODES ANN. § 10-1307 (Cum. Supp. 1977); NEB. REV. STAT. § 28-1503 (1975); NEV. REV. STAT. § 200.506 (1977); N.H. REV. STAT. ANN. § 169.43 (Supp. 1975); N.J. STAT. ANN. § 9:6-8.46 (West 1976); N.M. STAT.

waiver is primarily that often the parents know the cause of the injuries suffered by the child. To permit the abusive parent to injure the child and then cause the other parent to remain silent by invoking the privilege is tantamount to encouraging further abuse of the child.²³⁹ This would allow the privilege to become a shield for the abusive parent in much the same manner that the physician-patient privilege could be used to muzzle the physician and prevent him from reporting what he had seen.

Waiving the attorney-client privilege presents obvious problems to a client, should his confidences be betrayed by the very person entrusted to keep them. If such confidences were to be made known in court without his consent, it would amount to no less than an abrogation of his right to a fair hearing. Two states have waiver statutes which conceivably can be construed to abrogate the traditional attorney-client relationship.²⁴⁰ The Alabama statute provides that "[t]he doctrine of privileged communications shall not be a ground for excluding any evidence regarding a child's injuries or the cause thereof."²⁴¹ Nevada makes inapplicable in abuse cases "all privileges against disclosure recognized by Nevada law."²⁴² An attempt actually to waive such a privilege in either state would raise serious questions relating to the desirability of such clauses and, perhaps, even raise a question as to their constitutionality. That such an exception is permitted by any statute appears to fly in the face of Canon 27 of the American Bar Association's *Code of Professional Ethics*, which provides in part:

It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment. . . . A lawyer should not continue employment when he discovers that his obligation prevents the performance of his full duty to his former or to his new client. . . .

ANN. § 13-14-4.2A (Replacement 1976); N.C. GEN. STAT. § 110-121 (1975); N.D. CENT. CODE § 50-25.1-10 (Cum. Supp. 1977); OKLA. STAT. ANN. tit. 21, § 848 (West Cum. Supp. 1977-1978); OR. REV. STAT. § 418.775 (1977); PA. STAT. ANN. tit. 11, § 2222(2) (Purdon Cum. Supp. 1977-1978); R.I. GEN. LAWS § 40-11-11 (1977); S.C. CODE § 20-310.3 (Cum. Supp. 1975); S.D. CODIFIED LAWS § 26-10-15 (Supp. 1977); TENN. CODE ANN. § 37-1211 (Supp. 1977); TEX. FAM. CODE tit. 2, § 34.04 (Vernon 1975); VA. CODE § 63.1-248.11 (Cum. Supp. 1977); WASH. REV. CODE ANN. § 26.44.060(4) (Supp. 1976); W. VA. CODE § 49-6A-7 (Cum. Supp. 1977); WYO. STAT. § 14-28.12 (Interim Supp. 1977).

239. Friedrich & Borniskin, *supra* note 40, at 203.

240. These states are Alabama and Nevada.

241. ALA. CODE tit. 27, § 24 (Interim Supp. 1975).

242. NEV. REV. STAT. § 200.506 (1977).

If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation. The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosure as may be necessary to prevent the act or protect those against whom it is threatened.²⁴³

A difficult question to resolve arises if a lawyer receives information concerning past instances of child abuse which leads him to an inference of continuing abuse. This leads to the possibility of preventing further abuse by disclosing such facts to the proper authorities.²⁴⁴ One legal commentator believes that

it may be less clear that the obligation of confidentiality does not exist where the attorney or any other counsellor is not being consulted in relation to the possibility of future abuse and when he is not being asked to assist in concealment of the abuse of the child.²⁴⁵

Another privilege to be considered is the social worker-client relationship. Most states do not consider this relationship to be a confidential one.²⁴⁶ A New York statute does not consider communications between parent and counselor to be confidential if the communication by the parent reveals the contemplation of a crime or harmful act.²⁴⁷ An Illinois appellate court held that an Illinois statute which prohibits social workers from disclosing information they have gained from persons consulting with them in their professional capacity does not prevent social workers from testifying as to information gained from investigating child abuse cases.²⁴⁸ By disclosing information obtained by investigating cases of child abuse, social workers are attempting to prevent further abuse. To prohibit such disclosure would effectively frustrate the social worker's duty of protecting the child.²⁴⁹

(i). *Temporary protective custody.* A typical method of dealing

243. ABA CANONS OF PROFESSIONAL ETHICS No. 37.

244. McCoid, *supra* note 81, at 31.

245. *Id.*

246. Sussman, *supra* note 83, at 299.

247. N.Y. CIV. PRAC. LAW § 4508 (McKinney Cum. Supp. 1977-1978).

248. *In re Pitts*, 44 Ill. App. 3d 46, 357 N.E.2d 872 (3d Dist. App. Ct. 1976). The statute being attacked as unconstitutional is ILL. ANN. STAT. ch. 23, § 5320 (Smith-Hurd 1968).

249. 357 N.E.2d at 874.

with the problem of child abuse is to remove the child from the custody of the abusing parents either temporarily or permanently. There are two kinds of temporary protective custody: retention of the child in a medical facility and removal of the child from its home environment. With regard to the custody of a child, one statute provides:

Any person in charge of a hospital or similar institution or any physician treating a child may keep the child in his custody without consent of the parents or guardian, whether or not additional medical treatment is required, if the circumstances or conditions of the child are such that continuing in his place of residence or in the care or custody of the parent, guardian, custodian or other person responsible for the child's care presents an imminent danger to the child's life or health.²⁵⁰

The right of a physician or the chief administrative officer of a hospital or similar institution to retain custody of a child in his care is beginning to gain wide acceptance. In statutes which include the word "health" in the phrase "in imminent danger to the child's life or health," the standard to be met is that if the child were released, he might suffer further injury.²⁵¹ It is the intent of these statutes to give physicians and medical institutions some flexibility in dealing with what they feel to be a potentially hazardous home environment for the child. To ensure that this custodial detention is actually temporary, statutory provisions delineate the length of detention without an authorized judicial proceeding. Four states require that a court order be secured prior to any attempt to remove the child from the custody of parents or guardian.²⁵² Ten states provide for protective custody until social services or the police can take over.²⁵³ Nine states provide that social services may assume protective

250. FLA. STAT. § 827.07(6), *as amended by* ch. 77-429, 1977 Fla. Sess. Law Serv.

251. See, e.g., N.Y. SOC. SERV. LAW § 417(1) (McKinney 1976); VA. CODE § 63.1-248.9(A) (Cum. Supp. 1977).

252. LA. REV. STAT. ANN. § 14:403G(6) (West 1974). The Louisiana statute provides that the child welfare unit "shall request the juvenile court or other court exercising juvenile jurisdiction to issue an instant order for the temporary removal and placement of the child pending completion of the investigation and disposition of the case." See also MASS. GEN. LAWS ANN. ch. 119, § 51(C) (West Cum. Supp. 1977-1978); S.C. CODE § 20-310.2 (Cum. Supp. 1975); W. VA. CODE § 49-6A-9 (Cum. Supp. 1977).

253. ILL. ANN. STAT. ch. 23, § 2055 (Smith-Hurd Cum. Supp. 1977); MD. ANN. CODE art. 27, § 35A(f)(1) (Replacement 1976); N.C. GEN. STAT. § 110-118(d) (Cum. Supp. 1977); OHIO REV. CODE § 2151.42.1 (Anderson 1976); OR. REV. STAT. § 418.760(3) (1977); PA. STAT. ANN. tit. 11, § 2208(b) (Purdon Cum. Supp. 1977-1978); R.I. GEN. LAWS § 40-11-5 (1977); WASH. REV. CODE ANN. § 26.44.056 (Supp. 1976);

custody of a child when there exists a real danger to the child's well-being.²⁵⁴ Four of these states also require that a court order be secured by the next regularly scheduled day to permit further detention of the child.²⁵⁵ Two states allow a child to remain in temporary protective custody for ninety-six hours or longer.²⁵⁶ Three states permit a maximum period of forty-eight hours before the retention agency must apply for a court order to maintain the child in temporary custody.²⁵⁷ Nineteen states provide that a treating physician, hospital, or similar institution may keep a child for a limited amount of time even though the child is not in need of immediate hospital care.²⁵⁸

These statutes also require that a reasonable effort be made to notify the parents or guardian that the child has been placed under temporary protective custody.²⁵⁹ The placement of a child in a protective

WIS. STAT. ANN. § 48.981(1) (Cum. Supp. 1977-1978); WYO. STAT. § 14-28.9:2(a) (Interim Supp. 1977).

254. ALASKA STAT. § 47.17.030(b) (1975); CONN. GEN. STAT. ANN. § 17-38a(e) (Cum. Supp. 1978); MD. ANN. CODE art. 27, § 35A(f-l) (Replacement 1976); MO. ANN. STAT. § 210.125 (Vernon Cum. Supp. 1978); N.Y. SOC. SERV. LAW § 417(1) (McKinney 1976); PA. STAT. ANN. tit. 11, § 2208(2) (Purdon Cum. Supp. 1977-1978); N.D. CENT. CODE § 50-25.1-06 (Supp. 1977); TENN. CODE ANN. § 37-1204 (1977); TEX. FAM. CODE tit. 2, § 17.01 (Vernon Cum. Supp. 1978).

255. Missouri, New York, Tennessee, Pennsylvania.

256. CONN. GEN. STAT. ANN. § 17-38a(c) (Cum. Supp. 1978); N.D. CENT. CODE § 50.25.1-07 (Supp. 1977).

257. IDAHO CODE § 16-1612 (Cum. Supp. 1977); MONT. REV. CODES ANN. § 10-1309(2) (Cum. Supp. 1977); R.I. GEN. LAWS § 40-11-5 (1977).

258. ALA. CODE tit. 27, § 22(1) (Interim Supp. 1975); ARK. STAT. ANN. § 42-811 (1977); CONN. GEN. STAT. ANN. § 17-38a(d) (Cum. Supp. 1978); FLA. STAT. § 827.07(6)(b), *as amended by ch. 77-429, 1977 Fla. Sess. Law Serv.*; ILL. ANN. STAT. ch. 25, § 2055 (Smith-Hurd Cum. Supp. 1977); KY. REV. STAT. § 199.335(4) (1977); MICH. COMP. STAT. ANN. § 722.626(1) (West Cum. Supp. 1977-1978); MO. ANN. STAT. § 210.125(3) (Vernon Cum. Supp. 1978); N.J. STAT. ANN. § 9:6-8.16 (West 1976); N.Y. SOC. SERV. LAW § 417(1) (McKinney 1976); N.C. GEN. STAT. § 118(d) (Cum. Supp. 1977); N.D. CENT. CODE § 50.25.1-07 (Supp. 1977); OHIO REV. CODE § 2151.42.1 (Anderson 1976); PA. STAT. ANN. tit. 11, § 2208(2) (Purdon Cum. Supp. 1977-1978); R.I. GEN. LAWS § 40-11-5 (1977); TENN. CODE ANN. § 37-1204 (1977); TEX. FAM. CODE tit. 2, § 35.04 (Vernon Cum. Supp. 1978); WASH. REV. CODE ANN. § 26.44.056 (Supp. 1976); WYO. STAT. § 14-28.9:2(b) (Interim Supp. 1977).

259. *See, e.g., FLA. STAT. § 827.07(6)(b), as amended by ch. 77-429, 1977 Fla. Sess. Law Serv.*; MD. ANN. CODE art. 27, § 35A(j)(1)-(3) (Cum. Supp. 1977). The Maryland reporting statute has attempted to alleviate the constitutional issue of parental due process rights by statutorily providing rules and regulations protecting the rights of suspected child abusers. Among these are: notice to the person suspected of being an abuser prior to his name being entered in the state central registry; a guaranteed right

retention situation has been described as a “possibly dangerous but necessary legal tool.”²⁶⁰ One commentator notes that those social services agencies which provide child protective services usually carry out “aggressive social casework techniques.”²⁶¹ Since these agencies frequently reach out into the lives of those individuals who come within the scope of their operations without being asked, the statutory tool of protective custody is extremely susceptible to misuse.²⁶² Another commentator believes that the temptation to misuse this legal device is too great to allow its unbridled use.²⁶³ He feels that only a social services agency should be permitted to remove the child, and only if it first secures a court order allowing the retention of the child.²⁶⁴

The argument against the protective removal of an abused child is similar to the one against his temporary retention: “the protection of children cannot, and need not, be accomplished at the expense of violating fundamental rights of parents.”²⁶⁵ There must be some entity between the parent and the person having taken custody of the child. This entity must be the courts or a statutorily appointed authority which will secure the parent’s basic rights.²⁶⁶ A court order provides the necessary separation of interest between the rights of parents and the possible intemperate or inexperienced actions by the agencies or individuals who have the child in protective custody.²⁶⁷ The District Court for the Southern District of Texas in *Sims v. State Department of Public Welfare*²⁶⁸ stated that removal of a child without notice from his home environment can take place only if there exists an “immediate threat to the safety of the child.”²⁶⁹ Even so, some standards of due process must still be recognized. The court also held that the state may not “retain custody of a child for more than ten days without a complete adversary hearing with

of appeal upon request by the suspected abuser pertaining to whether his name shall remain in the central registry; and limiting names entered in the central registry to persons adjudicated as abusers.

260. Sussman, *supra* note 83, at 291.

261. Paulsen, *supra* note 85, at 46.

262. *Id.* at 46.

263. McCoid, *supra* note 81, at 49-50.

264. *Id.* at 50.

265. Krause, *supra* note 106, at 243.

266. McCoid, *supra* note 81, at 55.

267. V. DEFRANCIS, CHILD ABUSE LEGISLATION IN THE 1970's 184 (American Humane Assoc., Children's Div. 1974).

268. 438 F. Supp. 1179 (S.D. Tex. 1977) [hereinafter referred to as *Sims v. State*].

269. *Id.* at 1192.

notice to the parents.”²⁷⁰ The running of this period would begin with the day of the service, not the day of the initial orders permitting seizure; the burden is on the state to make a clear showing that further custody of the child is necessary to protect the child from harm.²⁷¹

The argument for removal of the child from his home environment is particularly strong when the child has been physically abused. There exists a real threat of harm to the child if he is left in a home environment which has already caused him physical harm.²⁷² One commentator has noted that there exists from between a 20% to 30% chance of permanent injury or even death should a child be returned to his home environment.²⁷³ Another commentator places the injury rate at over 50%.²⁷⁴

(j). *Evidentiary use of color photographs and x-rays.* Even though the statutory trend in mandatory categories of persons required to report instances of child abuse is expanding, the physician is probably best able to discover the evidence of multiple injuries in various stages of healing which might be identified as constituting the “battered child syndrome.”²⁷⁵ A physician is able to undertake certain tests to determine the extent and probable cause of the injuries inflicted upon the child. The statutes of eighteen states authorize the taking of color photographs of the areas of noticeable physical abuse.²⁷⁶ They permit taking of x-rays to determine the extent of internal injuries which might not be readily noticeable from an external examination. The purpose for such a provision is to allow for complete documentation of abuse which can be

270. *Id.* at 1193.

271. *Id.* at 1193, 1194.

272. *Helfer, The Responsibility and Role of the Physician*, in *THE BATTERED CHILD* 28, 33 (Kempe & Helfer eds., 2d ed. 1974).

273. *Id.*

274. V. FONTANA, *supra* note 63, at 23.

275. McCoid, *supra* note 81, at 28.

276. ARIZ. REV. STAT. § 13-842.01(d) (West Supp. 1957-1977); ARK. STAT. ANN. § 42-810 (1977); COLO. REV. STAT. § 19-10-106 (Cum. Supp. 1976); FLA. STAT. § 827.07(4)(c), *as amended by* ch. 77-429, 1977 Fla. Sess. Law Serv.; ILL. ANN. STAT. ch. 23, § 2056 (Smith-Hurd Cum. Supp. 1977); IOWA CODE ANN. § 235A.11 (West Cum. Supp. 1977-1978); ME. REV. STAT. ANN. tit. 22, § 3854.2(G) (West Cum. Supp. 1977-1978); MICH. COMP. LAWS ANN. § 722.626(2) (West Cum. Supp. 1977-1978); MO. ANN. STAT. § 210.120 (Vernon Cum. Supp. 1978); N.J. STAT. ANN. § 9:6-8.46 (West 1976); N.Y. SOC. SERV. LAW § 416 (McKinney 1976); OHIO REV. CODE § 2151.42.1 (Anderson 1976); OR. REV. STAT. § 418.764 (1977); PA. STAT. ANN. tit. 11, § 2207 (Purdon Cum. Supp. 1977-1978); TEX. FAM. CODE tit. 2, § 35.04 (Cum. Supp. 1978); VA. CODE § 63.1-248.13 (Cum. Supp. 1977); WASH. REV. CODE ANN. § 26.44.050 (Supp. 1976); W. VA. CODE § 49-6A-4 (Cum. Supp. 1977); WYO. STAT. § 14-28.9(c) (Interim Supp. 1977).

catalogued in a medical file. Such a medical file may then be entered as evidence at a trial should the parents or guardian be prosecuted for causing the injuries observed by the physician while examining the child. One statute provides:

Any person required to investigate causes of suspected child abuse or maltreatment may take or cause to be taken photographs of the areas of trauma on a child who is subject to a report and, if the areas of trauma visible on the child indicate a need for a radiological examination, may cause the child to be referred for diagnosis to a licensed physician or an emergency department in a hospital. Any licensed physician who has reasonable cause to suspect that an injury was the result of child abuse may authorize a radiological examination to be performed on the child. The county in which the child is a resident shall bear the initial cost for the x-rays of the abused child; however, the parent, guardian, or custodian of the child shall be required to reimburse the county for the costs of such x-rays, and to reimburse the Department of Rehabilitative Services for the cost of photographs taken pursuant to this paragraph. Any photographs or reports on x-rays taken pursuant to this section shall be sent to the department at the time the written report is sent or as soon thereafter as possible.²⁷⁷

Permitting a physician to have photographs of x-rays taken of a child he suspects of having been abused means that he need not first obtain parental permission or release to do so. Other than ensuring that a proper physical record is made documenting any evidence of child abuse in the nature of physical trauma, commentators are divided as to the extent to which physicians should be evidence gatherers or legal-medico detectives.²⁷⁸

The physician, as the person examining the child, is the individual best able to determine whether the child's injuries are disparate from the explanation given by the parents.²⁷⁹ If the parent's explanation of the child's injuries is different from what the physician's examination indicates, the physician's report to the authorized receiving agency should be given greater weight in the determination of whether physical abuse

277. FLA. STAT. § 827.07(4)(c), as amended by ch. 77-429, 1977 Fla. Sess. Law Serv.

278. See Krause, *supra* note 106, at 257; see also McCoid, *supra* note 81, at 28. But see Paulsen, *supra* note 85, at 10.

279. McCoid, *supra* note 81, at 28.

has been inflicted upon the child.²⁸⁰ Those opposing the idea that a physician may also function as a detective believe that it is beyond a physician's competence "to determine who inflicted injuries on a child."²⁸¹ A diagnosis of injury should be limited to no more than a reasonable guess "that the injuries suffered were not caused by an unavoidable accident."²⁸²

(k). *The central registry.* The idea of establishing central registries did not become popular until the mid-1960s. Since then, the trend has been toward the establishment of registries either at the local level or on a statewide basis. Only four states maintained registries in 1966 under legislative mandate.²⁸³ This increased to nineteen by 1970,²⁸⁴ with forty states at present maintaining such registries through statutory enactment.²⁸⁵

280. Krause, *supra* note 106, at 257. While identification of child abuse should be tempered by awareness of the fact that children may suffer physical marks, bruises, and scratches due neither to parental neglect nor intent, the treating physician must be cognizant of discrepancies between the degree of the trauma and the history given to explain the injuries. Essential tasks for the physician to consider are skillful interviewing, obtaining historical data, and performing physical examinations to rule out causes of either abuse or neglect.

281. Paulsen, *supra* note 85, at 28.

282. *Id.*

283. Sussman, *supra* note 83, at 300.

284. V. DeFRANCIS, *supra* note 267, at 178.

285. The following states provide for the establishment of central registries through statutory enactment: ALA. CODE tit. 27, § 22(3)(1) (Interim Supp. 1975); ALASKA STAT. tit. 47, § 17.040 (Cum. Supp. 1977); ARK. STAT. ANN. § 42-818 (1977); CAL. WELF. & INST. § 18960(g) (Deering Supp. 1977); COLO. REV. STAT. § 19-10-114(1) (Cum. Supp. 1976); CONN. GEN. STAT. ANN. § 17-38a(g) (Cum. Supp. 1978); DEL. CODE tit. 16, § 904(c) (Revised 1974); FLA. STAT. § 827.07(7), *as amended by* ch. 77-429, 1977 Fla. Sess. Law Serv.; HAW. REV. STAT. § 350-2 (1976); IDAHO CODE § 16-1623(c) (Cum. Supp. 1977); ILL. ANN. STAT. ch. 23, § 2061 (Smith-Hurd Cum. Supp. 1977); IOWA CODE ANN. § 235A.14 (West Cum. Supp. 1977-1978); LA. REV. STAT. ANN. § 14:403H (West 1974); ME. REV. STAT. ANN. tit. 22, § 3859(2) (West Cum. Supp. 1977-1978); MD. ANN. CODE art. 27, § 35A(i) (Replacement 1976); MASS. GEN. LAWS ANN. ch. 119, §§ 51E-51F (West Cum. Supp. 1977-1978); MICH. COMP. LAWS ANN. § 722.627(1) (West Cum. Supp. 1977-1978); MINN. STAT. ANN. § 626.556(11) (West Cum. Supp. 1978), *as amended by* ch. 212, 1977 Minn. Sess. Law Serv.; MISS. CODE ANN. § 43-24-1 (Cum. Supp. 1977); MO. ANN. STAT. § 210.145(2) (Vernon Cum. Supp. 1978); NEB. REV. STAT. § 28-1506 (1975); NEV. REV. STAT. § 200.504(1)(c) (1977); N.H. REV. STAT. ANN. § 169:44 (Supp. 1975); N.J. STAT. ANN. § 9:6-8.11 (West 1976); N.Y. SOC. SERV. LAW § 422(1) (McKinney 1976); N.C. GEN. STAT. § 110-112 (1975); N.D. CENT. CODE § 50-25.1-11 (Supp. 1977); OHIO REV. CODE § 2151.42.1 (Anderson 1976); OKLA. STAT. ANN. tit. 21, § 846 (West Cum. Supp. 1977-1978); OR. REV. STAT. § 418.765

A large number of state laws establishing central registries make reference to their use as diagnostic instruments or as research and planning tools.²⁸⁶ As a practical matter, however, few states can show more than sporadic use of their registries by professionals who have requested information regarding suspicious cases of abuse or neglect.²⁸⁷ Registries are often hampered by incomplete, inaccurate, and old information which diminishes their effectiveness as part of a viable statewide child protection program.

With the expansion in scope of the state child abuse laws, the purposes and goals of the registries have changed somewhat.²⁸⁸ The impetus for their change has come with a reduction of evidentiary standards presently required by many of the reporting statutes—reasonable suspicion of maltreatment, rather than the requirement of specific evidence.²⁸⁹

One of the primary benefits of well-structured statewide central registries is the ability of authorized officials to “trace” the abusive adult so that his ability to avoid detection by continually bringing the abused child to different doctors and hospitals is lessened.²⁹⁰ Some states require that assistance be given to sister states when there is a reasonable suspicion that abusive parents are “hospital shopping” across state lines.²⁹¹

As a research tool, the central registries can be a boon to those attempting to understand better the societal causes and interactions of those who abuse and maltreat children. With properly motivated and organized staff personnel, many of the registries presently in existence could develop demographic and other studies which may increase under-

(1977); PA. STAT. ANN. tit. 11, § 2214(a) (Purdon Cum. Supp. 1977-1978); R.I. GEN. LAWS § 40-11-7 (1977); S.C. CODE § 20-310.4 (Cum. Supp. 1975); S.D. CODIFIED LAWS § 26-10-12.2 (1976); TENN. CODE ANN. § 37-1208 (Supp. 1977); TEX. FAM. CODE tit. 2, § 34.04 (Vernon 1975); VT. STAT. ANN. tit. 13, § 1356 (Cum. Supp. 1977); VA. CODE § 63.1-248.8 (Cum. Supp. 1977); WASH. REV. CODE ANN. § 26.44.070 (Supp. 1976); WYO. STAT. § 14.28.13 (Interim Supp. 1977).

286. NAT'L CENTER ON CHILD ABUSE AND NEGLECT, U.S. DEP'T. OF HEALTH, EDUCATION & WELFARE, 3 CHILD ABUSE AND NEGLECT: THE PROBLEM AND ITS MANAGEMENT 14 (1975) [hereinafter referred to as 3 CHILD ABUSE AND NEGLECT: THE PROBLEM AND ITS MANAGEMENT].

287. *Id.*

288. *Id.* at 17.

289. *Id.*

290. Krause, *supra* note 106, at 246.

291. See, e.g., COLO. REV. STAT. § 19-10-114(11) (Cum. Supp. 1976).

standing of the nature and extent of abuse.²⁹² Such studies, when coordinated with other child protective service plans, could evaluate the effectiveness of a state's abuse prevention efforts.

The use, or, more accurately, the misuse of information placed in central registries has been of much concern to those who fear infringement of the right to privacy of both child and parent. The court in *Sims v. State*²⁹³ held that although the state may investigate reports of abuse, there exists no valid reason why the accused family should not have access to the "fruits of that invasion or the conclusions reached."²⁹⁴ The court did recognize that where the confidentiality of the source had been guaranteed either administratively or through a judicial hearing, such information should not be released to the family.²⁹⁵

Although many of the reporting statutes make provision for the confidentiality of stored information, there is surprisingly little uniformity in guidelines which govern the dissemination of collected information.²⁹⁶ Some states do not legislatively mandate a specific procedure for disclosure of information.²⁹⁷ Rather, these states leave the promulgation of regulations to the agency designated to maintain the central registry.²⁹⁸

292. 3 CHILD ABUSE AND NEGLECT: THE PROBLEM AND ITS MANAGEMENT, *supra* note 286, at 26.

293. 438 F. Supp. 1179 (S.D. Tex. 1977).

294. *Id.* at 1194, 1195, where the court held that the following provisions of TEX. FAM. CODE tit. 2, §§ 34.05(c) and 34.08, are unconstitutional on their face.

295. *Id.*

296. Thirty-six states at present require that records gathered on suspected or known cases of child abuse and neglect be kept confidential, and to varying degrees, inaccessible to public scrutiny. *See, e.g.*, COLO. REV. STAT. § 19-10-114(4) (Cum. Supp. 1976); FLA. STAT. § 827.07(7), *as amended by* ch. 77-429, 1977 Fla. Sess. Law Serv.; ILL. ANN. STAT. ch. 23, § 2061 (Smith-Hurd Cum. Supp. 1977).

297. Typical of the statutes which fail to specify the procedure for ensuring the confidentiality of information gathered by the central registries is ILL. ANN. STAT. ch. 23, § 2061 (Smith-Hurd Cum. Supp. 1977) which provides: "[T]he Department [of Children and Family Services], by regulation, [shall] regulate the entry and retention of child abuse and neglect information and access thereto."

298. The absence of legislative direction in the reporting statutes is dangerous to the concept of individual privacy. Such statutes fail to define terms such as confidentiality, and to specify what agencies and professionals may have access to records. In discussing these potential dangers, Sussman concludes that "in many states the ironic situation is created whereby those for whom disclosure was originally intended make little use of the register while other, unintended individuals, are granted relatively free access." Sussman, *Keeping Records on Suspected Child Abuse*, in COUNCIL WOMAN 11 (Winter 1977).

There is growing concern among legal and social commentators that irreparable harm may be caused to the child who may be labeled an "abused child" for a lifetime.²⁹⁹ Of equal concern is the perpetuation of inaccurate and unverified information which, if released, may damage the person's reputation and threaten his livelihood. Since abuse and neglect are now thought to be part of a repetitive cycle whereby one generation passes to another the characteristics of the abusive parent, government agencies may become inclined to make undue observation of a child so labeled as he attains adulthood, marries, and has children of his own.³⁰⁰

To alleviate the concerns of those who believe unbridled use of central registries may cause more harm than good, an increasing number of states have very strict guidelines for the classification and expunging of reports.³⁰¹ One agency is usually authorized to receive, investigate, and follow up on suspected cases of abuse or neglect. A single agency controlling all aspects of the investigation process will minimize the danger of misuse of the registry.

When a suspected case of child abuse reaches the receiving agency, the case goes through a number of distinct classifications. These classifications in the Florida child abuse statute are termed: under investigation; abuse indicated; and abuse unfounded.³⁰² Upon completing an investigatory report, the receiving agency makes a determination whether the report is unfounded or indicates abuse.³⁰³ Reporting laws in a number of states provide that information be removed immediately from the registry if it is unfounded or otherwise inappropriately gathered or stored.³⁰⁴ Some states also provide that information gathered and stored in the registry will be expunged once the child attains a

299. It has been suggested that information received by the central registries may at some future date be used to raise "the issue of competency of a family or the risk to a child." 1977 *Senate Hearings*, *supra* note 5, at 710 (statement of Eli Newberger).

300. *Id.*

301. See, e.g., ARK. REV. STAT. ANN. § 42-818(4) to 818(6) (1977); FLA. STAT. § 827.07(7), as amended by ch. 77-429, 1977 Fla. Sess. Law Serv.

302. FLA. STAT. § 827.07(8), as amended by ch. 77-429, 1977 Fla. Sess. Law Serv., has established this classification system for categorizing "all reports of child abuse or maltreatment maintained within the central registry. . . ."

303. See note 186, *supra*.

304. FLA. STAT. § 827.07(8), as amended by ch. 77-429, 1977 Fla. Sess. Law Serv., states that "[a]ll identifying information contained in reports classified as unfounded shall be immediately expunged."

certain age, usually eighteen.³⁰⁵ In other instances, a statutorily determined length of time is established which begins when the case of child abuse is first reported. Seven years is the length of time used in Florida.³⁰⁶

Access to information stored in central registries is usually restricted to receiving agency personnel. Limited access may be permitted to information on file for valid research in some states.³⁰⁷ Restrictions placed on such access includes the anonymity of the abused child, abusing parent, or guardian and reporter.

To maintain the confidentiality of the information stored in the central registries, twenty-six states include a penalty provision for persons divulging information in an unauthorized manner.³⁰⁸ Fines range from \$100³⁰⁹ to \$1,000, with a jail sentence of up to two years.³¹⁰

(1). *Failure to provide medical care because of religious beliefs.* Numerous United States Supreme Court decisions have held that the parent-child relationship is a fundamental part of our society.³¹¹ The care, custody, and nurture of children has been the primary

305. PA. STAT. ANN. tit. 11, § 2214(n) (Purdon Cum. Supp. 1977-1978).

306. FLA. STAT. § 827.07(8), *as amended by* ch. 77-429, 1977 Fla. Sess. Law Serv., places a limit on how long information may remain within the registry, which at this time is seven years. This section provides, however, that if the individual remains under the supervision of the Department of Health and Rehabilitative Services, then the information shall remain within the registry until the Department determines otherwise.

307. COLO. REV. STAT. § 19-10-115(2) (Cum. Supp. 1976).

308. ALA. CODE tit. 27, § 22(3)(3) (Interim Supp. 1975); ALASKA STAT. § 47.17.040(b) (Cum. Supp. 1977); ARK. STAT. ANN. § 42-818 (1977); COLO. REV. STAT. § 19-10-114(10) (Cum. Supp. 1976); CONN. GEN. STAT. ANN. § 17-38a(g) (Cum. Supp. 1978); IOWA CODE ANN. § 12-3-4.20 (West Cum. Supp. 1977-1978); KAN. STAT. § 38-723 (Cum. Supp. 1977); LA. REV. STAT. ANN. § 14:403 I (West 1974); ME. REV. STAT. ANN. tit. 22, § 3859(1) (Cum. Supp. 1977-1978); MASS. GEN. LAWS ANN. ch. 119, § 51E-51F (West Cum. Supp. 1977-1978); MICH. COMP. LAWS ANN. § 722.633(2) (West Cum. Supp. 1977-1978); MISS. CODE ANN. § 43-24-5 (Cum. Supp. 1977); MO. ANN. STAT. § 210.150(2) (Vernon Cum. Supp. 1978); NEB. REV. STAT. § 28-1506 (1975); NEV. REV. STAT. § 200.5045(2) (1977); N.H. REV. STAT. ANN. § 169:45 (Supp. 1975); N.Y. SOC. SERV. LAW § 422(10) (McKinney 1976); N.D. CENT. CODE § 50-25.1-14 (Supp. 1977); OHIO REV. CODE § 2151.42.1 (Anderson 1976); OKLA. STAT. ANN. tit. 21, § 846 (West Cum. Supp. 1977-1978); PA. STAT. ANN. tit. 11, § 2215(g) (Purdon Cum. Supp. 1977-1978); R.I. GEN. LAWS § 40-11-13 (1977); S.D. CODIFIED LAWS § 26-10-12.3 (1976); VT. STAT. ANN. tit. 13, § 1356 (Cum. Supp. 1977); W. VA. CODE § 49-614-8 (Cum. Supp. 1977); WYO. STAT. § 14-28.14(a) (Interim Supp. 1977).

309. W. VA. CODE § 49-6A-8 (Supp. 1977).

310. MASS. GEN. LAWS ANN. ch. 119, § 51F (West Cum. Supp. 1977-1978).

311. *See, e.g., Stanley v. Illinois*, 405 U.S. 645, 651 (1972), where the Supreme

function of the family. The child's reciprocal right to this parental support, however, is also a concern of the courts.³¹² Recognition of this conflict has led a number of states to include a statutory exclusion from their definitions of abuse or neglect pertaining to "spiritual treatment." Proper use of this exclusion is of paramount concern when children have been threatened by parental unwillingness to accede to emergency medical care which involves surgery or blood transfusions.

Even though many persons place little faith in spiritual healing, those who do may hold a strong belief which should be interfered with only under extraordinary circumstances. There exists a constitutional obligation to permit a liberal exercise of the freedom of religion among individuals. A dilemma arises where this exercise of religious freedom endangers the welfare of a minor.³¹³ The courts must balance the rights of the parent to religious freedom with the equally fundamental right of the child to live.³¹⁴

The number of states permitting this "spiritual treatment" exemption has steadily increased. In 1967, seven states had such an exemption in their reporting statutes, while seventeen states did so by 1974.³¹⁵ Twenty-seven states at present include the exemption in their reporting statutes.³¹⁶ Many of these states seek a compromise which recognizes

Court stated that it had "frequently emphasized the importance of the family." The Court further noted "that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."

312. Singleman, *supra* note 9, at 1062. *See, e.g.,* Gomez v. Perez, 409 U.S. 535 (1973).

313. *See In re Ivey*, 319 So. 2d 53 (Fla. 1st DCA 1975), holding that in a life or death situation, as confirmed by the treating physician, treatment may be ordered under the state juvenile judicial treatment statute to treat the dependent child without first seeking the consent or approval of the parents. The court interpreted FLA. STAT. § 827.07(2) (1975) as not precluding the court from ordering either that medical services be provided or that treatment by a duly accredited practitioner who relies solely on spiritual means of healing be provided to the children. Recognizing the ambiguity of the statute section, the Florida Legislature recently enacted an amendment to the child abuse statute which greatly clarifies the authority of a court to order medical care when the health of children requires it. For the text of pertinent portions of FLA. STAT. § 827.07(2), *as amended* by ch. 77-429, 1977 Fla. Sess. Law Serv., *see* note 317, *infra*.

314. V. DeFRANCIS, *supra* note 267, at 180.

315. Sussman, *supra* note 83, at 306.

316. ALA. CODE tit. 27, § 21 (Interim Supp. 1975); ARK. STAT. ANN. § 42-807 (1977); CONN. GEN. STAT. ANN. § 17-38d (1975); DEL. CODE tit. 16, § 906 (Revised 1974); D.C. CODE § 2-166 (1973); FLA. STAT. § 827.07(2), *as amended* by ch. 77-429, 1977 Fla. Sess. Law Serv.; HAW. REV. STAT. § 350-4 (1976); ILL. ANN. STAT. ch. 23, §

a parent's right to seek in "good faith" care for an ill child by means of Christian Science or by the teachings of a "well-recognized religion."³¹⁷

Regulations issued by the Social and Rehabilitation Service of the Department of Health, Education and Welfare on January 19, 1977, implementing the Federal Act addressed the issue of "spiritual treatment."³¹⁸ In defining the phrase "harm or threatened harm to a child's health or welfare,"³¹⁹ the regulations provide a qualified exemption for "spiritual treatment." This regulation states "that when a parent or guardian legitimately practicing his religious beliefs fails to provide specified medical treatment for a child, such failure alone shall not be considered neglect."³²⁰ The House Bill proposing the extension of the Federal Act recognizes the validity of this administrative decision by expanding the Federal Act's definition of abuse and neglect. The House Bill provides that a child who does not receive medical treatment by a parent or guardian "solely as a result of the legitimate practicing of religious beliefs of the parent or guardian"³²¹ will not be considered an

2054 (Smith-Hurd Cum. Supp. 1977); KAN. STAT. § 38-722 (Cum. Supp. 1977); LA. REV. STAT. ANN. § 14:403 B (4) (West 1974); ME. REV. STAT. ANN. tit. 22, § 3852(1) (West Supp. 1975); MICH. COMP. LAWS ANN. § 722.634 (West Cum. Supp. 1977-1978); MINN. STAT. ANN. § 626.556(2)(b) (West Cum. Supp. 1977-1978); MISS. CODE ANN. § 43-21-5(h) (Cum. Supp. 1977); MO. ANN. STAT. § 210.115(3) (Vernon Cum. Supp. 1978); NEV. REV. STAT. § 200.5011(2) (1977); OHIO REV. CODE ANN. § 2151.42.1 (Anderson 1976); OKLA. STAT. ANN. tit. 21, § 846 (West Cum. Supp. 1977-1978); OR. REV. STAT. § 418.740(1)(b) (1977); PA. STAT. ANN. tit. 11, § 2203 (Purdon Cum. Supp. 1977-1978); R.I. GEN. LAWS § 40-11-15 (1977); S.D. CODIFIED LAWS § 26-10-1.1 (1976); UTAH CODE ANN. § 55-16-1.5 (Supp. 1977); VT. STAT. ANN. tit. 13, § 1352 (Cum. Supp. 1977); VA. CODE § 63.1-248.2(A)(2) (Cum. Supp. 1977); WASH. REV. CODE ANN. § 26.44.020 (Supp. 1976); WYO. STAT. § 14-28.7(a)(vii) (Interim Supp. 1977).

317. See, e.g., FLA. STAT. § 827.07(2), as amended by ch. 77-429, 1977 Fla. Sess. Law Serv. The Florida statute provides in part:

A parent or guardian legitimately practicing his religious beliefs who thereby does not provide specified medical treatment for a child shall not, for that reason alone, be construed a negligent parent or guardian; however, such an exception shall not preclude a court from ordering, when the health of the child requires it, that:

(a) Medical services from a licensed physician as defined herein, or

(b) Treatment by a duly accredited practitioner who relies solely on spiritual means for healing in accordance with the tenets and practices of a well recognized church or religious organization, be provided.

318. [1977 Reference File] FAM. L. REP. (BNA) 101:0061.

319. *Id.* at 101:0062.

320. *Id.*

321. 1977 HOUSE AMENDMENTS, *supra* note 90, at 10.

abused or neglected child. The House Bill also states that this exception will not preclude a court from ordering that medical services be provided to a child, where the child's health and well-being require it.³²²

(m). *The guardian ad litem.* The guardian *ad litem* is a special guardian appointed by the court for the specific purpose of protecting the child's interest.³²³ His position is unique in that his obligations to the child are transient in nature and limited in scope. He usually has no contact with the child prior to his appointment, nor does his representation of the child continue after the conclusion of the case. A guardian *ad litem* need not be an attorney, except where it is specifically required by statute.³²⁴ Increasingly it is being recognized that as juvenile courts become more complex in their proceedings and cognizant of protecting all parties' rights of due process, the special skills of an attorney are best suited to ensure the satisfaction of the child's best interests.³²⁵

It has been shown that a child's interests will be endangered in cases of willful child abuse.³²⁶ The juvenile court is responsible for the well-being of a child in an abuse proceeding, and one commentator suggests that an independent representative be appointed by the court.³²⁷ Two reasons have been given for the need of such independent representation. First, as the child in many cases is abused by his own parents, it would be unwise to believe that his best interests would be protected by having an attorney represent him as well as his parents.³²⁸ Second, in states where the petitioner is the local social service agency, there is a real question as to whether its resources of time and personnel are available to represent the child adequately in an abuse case.³²⁹ The guardian *ad litem*, being a third party to a court action, is technically an advocate for the interests of the child rather than an adversary pitted against the

322. *Id.*

323. BLACK'S LAW DICTIONARY 834 (4th ed. rev. 1968) defines a guardian *ad litem* as "a guardian appointed by a court of justice to prosecute or defend for an infant in any suit to which he may be a party."

324. *E.g.*, CONN. GEN. STAT. ANN. § 17-38a(f)(2) (Cum. Supp. 1978). The Connecticut statute requires that counsel be appointed by the court to represent the best interests of the child.

325. *See* Krause, *supra* note 106, at 263; Fraser, *supra* note 83, at 21; Sussman, *supra* note 83, at 304.

326. *See* text accompanying notes 67-78, *supra*.

327. Fraser, *supra* note 83, at 17.

328. Fraser, *supra* note 153, at 118.

329. Grumet, *supra* note 62, at 314.

parents, social services, or the prosecutor's office.

At the present time, twenty-two states provide for the mandatory appointment of a guardian *ad litem* to represent the interests of the child in an abuse proceeding.³³⁰ Six other states allow the appointment of a guardian *ad litem* for children in cases of abuse resulting in the commencement of judicial proceedings.³³¹ The reporting statutes vary as to the degree of legislative instruction given to those appointed as guardians *ad litem*. One state simply provides that a guardian *ad litem* be appointed in a judicial proceeding involving a child in a child abuse case.³³² Other states, however, specify more exactly the parameters of a guardian *ad litem*'s authority and responsibilities. These responsibilities include (1) an investigatory role wherein the guardian *ad litem* may have access to all pertinent records, may interview witnesses, and may examine and cross-examine witnesses at hearings;³³³ (2) an advocacy role whereby the guardian *ad litem* ensures that all necessary facts are brought to the attention of the court;³³⁴ (3) a counselor role wherein

330. ALA. CODE tit. 27, § 24(1) (Interim Supp. 1975); ARK. STAT. ANN. § 42-817 (1977); CAL. WELF. & INST. § 326 (Deering Supp. 1977); COLO. REV. STAT. § 19-10-113(3) (Cum. Supp. 1976); CONN. GEN. STAT. ANN. § 17-38a(f)(2) (Cum. Supp. 1978); IDAHO CODE § 16-1618 (Cum. Supp. 1977); KAN. STAT. § 38-815(b) (Cum. Supp. 1977); ME. REV. STAT. ANN. tit. 22, § 3858 (West Supp. 1975); MICH. COMP. LAWS ANN. § 722.630 (West Cum. Supp. 1977-1978); MISS. CODE ANN. § 43-21-11 (Cum. Supp. 1977); MO. ANN. STAT. § 210.160 (Vernon Cum. Supp. 1978); N.C. STAT. ANN. § 9-6-8.23 (West 1976); N.Y. FAM. CT. ACT § 249 (1975); N.D. CENT. CODE § 50-25.1-08 (Supp. 1977); OHIO REV. CODE § 2151.28.1 (Anderson 1976); PA. STAT. ANN. tit. 11, § 2223(a) (Purdon Cum. Supp. 1977-1978); R.I. GEN. LAWS § 40-11-14 (1977); S.D. CODIFIED LAWS § 26-10-12.1 (Cum. Supp. 1975); TENN. CODE ANN. § 37-248 (1977); UTAH CODE ANN. § 55-16-7 (Supp. 1977); WASH. REV. CODE ANN. §§ 26.44.010-.053 (Supp. 1976); WYO. STAT. § 14-28.12:1(a) (Interim Supp. 1977).

Virginia, in a recent legislative session, repealed the guardian *ad litem* provision of its child abuse statute. VA. CODE § 63.1-248.12 (repealed 1977).

331. FLA. STAT. § 827.07(12), *as amended by ch. 77-429, 1977 Fla. Sess. Law Serv.*; LA. REV. STAT. ANN. § 14:403 G (7) (West 1974); MONT. REV. CODES ANN. § 10-1310(12) (Supp. 1977); N.M. STAT. ANN. § 13-14-25(G) (Replacement 1976); OKLA. STAT. ANN. tit. 21, § 846(B) (West Cum. Supp. 1977-1978); W. VA. CODE § 49-6-1(a) (Cum. Supp. 1977).

332. UTAH CODE ANN. § 55-16-7 (Supp. 1977).

333. *E.g.*, ME. REV. STAT. tit. 22, § 3858 (Supp. 1975). The Maine statute provides: "[H]e shall make such further investigation as he deems necessary to ascertain the facts," which may include "reviewing psychiatric, psychological and physical examinations of the child, parents or other persons having custody, interviewing witnesses, examining and cross-examining witnesses. . . ."

334. *E.g.*, ARK. STAT. ANN. § 42-817 (1977). The Arkansas statute requires that the guardian *ad litem* shall participate in the proceeding, whether that proceeding is

the guardian *ad litem* recommends various options to the court;³³⁵ and (4) a guardian role whereby the guardian *ad litem* represents the child and seeks to ensure the protection of his interests.³³⁶

The guardian *ad litem* provisions also hold him to be knowledgeable about the condition of the child and the facts of the case.³³⁷ A guardian *ad litem* may order the examination by a physician, psychiatrist, or psychologist of any parent or child or other person having custody of the child at the time of the alleged abuse.³³⁸ By statute, every opportunity should be afforded to the guardian *ad litem* so that he can perform properly a complex task whose outcome may have a crucial effect upon a generation of abused children.

(2). LEGISLATIVE TRENDS IN THE STATE REPORTING LAWS

After having examined the current reporting laws, certain future trends in the area are discernible. The state legislatures, partly due to the impetus of grants provided by the Federal Act,³³⁹ are shaping their reporting laws toward a more clearly defined "interventionist" role with respect to the family unit. This intervention by the state into the lives and welfare of individuals is the result of a general pattern of increased

dispositional or adjudicatory in nature. He shall also participate in the proceeding "to the degree appropriate for adequately representing the child."

335. *E.g.*, MICH. COMP. LAWS ANN. § 722.630(10) (West Cum. Supp. 1977-1978). The Michigan statute requires that the guardian *ad litem* make recommendations to the court which are in the best interests of the child.

336. *E.g.*, COLO. REV. STAT. ANN. § 19-10-113 (Cum. Supp. 1976). The Colorado statute provides that "the guardian *ad litem* shall be charged in general with the representation of the child's interests."

337. *E.g.*, CONN. GEN. STAT. ANN. § 17-38a(f) (Cum. Supp. 1978). The Connecticut statute provides that "the child shall be represented by counsel appointed by the court to speak in behalf of the best interests of the child, which counsel shall be knowledgeable about the needs and protection of children. . . ."

338. *E.g.*, WASH. REV. CODE ANN. § 26.44.053 (Supp. 1977). The Washington statute calls upon the court, by its own motion, "or the motion of the guardian *ad litem*, or other parties, [to] order the examination by a physician, psychologist or psychiatrist, of any parent or child or other person having custody of the child at the time of the alleged child abuse or neglect," upon clear evidence that an instance of child abuse or neglect has occurred.

But see *Sims v. State*, 438 F. Supp. 1179, 1191 (S.D. Tex. 1977), where the court declared that due process must extend to the "investigative stage of state action." Should psychiatric or physical examinations be objected to by the parents, an "adversary hearing before a judicial body" must be held.

339. *See* text accompanying notes 102-13, *supra*.

governmental action programs which, until recently, have been almost exclusively affairs of the community or of the individual.

With respect to the future course of the state reporting laws, this writer believes that there are three areas which will come under increased legislative scrutiny at the state level. These areas are: (1) the use of protective services as a means of preventing the recurrence of child abuse within the family; (2) the continuing expansion of the definition of child abuse and neglect which will encompass the concept of "mental injury;" and (3) the establishment of evidentiary standards which will make it easier for the state to show abusive or neglectful conduct by a parent or guardian in a legal action. Other trends include the further expansion of the reporters mandated to report known or suspected instances of child abuse known personally to them; universal immunity from civil or criminal prosecution for reporting a case of child abuse or neglect in good faith, or participating in a judicial hearing based upon a report given pursuant to the provisions of the law; and the increased use of the state central registries as repositories of data on verified cases of child abuse. It is anticipated that stringent restrictions will be placed on access to the files in the registries. To accomplish this, specific measures must be developed at the legislative level to purge from the files unfounded, unmeaningful, and inapplicable information which meet the parameters of an individual's right to privacy.

(a). *Protective services.* Legislators in many states have come to the realization that there exists a profound limitation on what legislative action can accomplish in solving deep-seated social problems. Most child abuse laws are reporting laws and do not cover other aspects of the problem, such as therapeutic assistance for the child and his family. Without the proper institutional framework, the law and the legislative process cannot create better services or better trained child protection staffs. Some states have already created the institutional framework for the reporting and investigation of suspected cases of child abuse and neglect.³⁴⁰ Most of these laws establish a mechanism for the provision of some type of treatment services.

340. *E.g.*, COLO. REV. STAT. § 19-10-109(6)(a) (Cum. Supp. 1976) ("It is the intent of the general assembly to encourage the creation of one or more child protection teams in each county or contiguous group of counties."); N.Y. SOC. SERV. LAW § 423 (McKinney 1976) ("Every local department of social services shall establish a 'child protective service' within such department."); PA. STAT. ANN. tit. 11, § 2216(a) (Purdon Cum. Supp. 1977-1978) ("Every county public child welfare agency shall establish a 'child protective service' within each agency.")

It must be recognized, however, that treatment services are the least developed part of the child protective system. Counseling, protective supervision, foster care, and temporary shelter care have been the predominant treatment services available in most communities for the past twenty years.

There exist two diverging points of view as to what should be the ultimate goals of the child protective services at the community level. One view is that the role of child protective services should be expanded to include provisions for long-range ameliorative treatment services. The other view calls for the establishment of services designed to deal with the short-term effect of abuse and neglect. These diverging views are related to the primary and secondary prevention of abuse. Primary prevention refers to the prevention of abuse before it occurs; secondary intervention fills the short-term needs of preventing abuse, as it is after-the-fact intervention. Expansion of legislation along these lines will probably be limited by the extent to which the states are able to provide necessary funding in the face of the current fiscal difficulties.

(b). *Expansion of the definition of child abuse and neglect.* The definition of abuse used in many of the early reporting statutes has gradually been expanded to include neglect, sexual abuse, and emotional deprivation. The dilemma faced by mandated reporters, social service personnel, and the courts alike is how best to determine whether an instance of abuse has occurred in any given suspected case. The reason for this uncertainty rests primarily with the definition of abuse set out in the reporting laws. In many states, abuse has become synonymous with any harm to a child that resulted from a parent's or guardian's acts of commission or omission which cause injury.³⁴¹

A number of states have expanded their definitions of abuse to include the concept of mental injury. This particular type of injury has been described as a state of substantially reduced psychological or intellectual functioning in relation to a number of factors which may vary from state to state.³⁴² Some of these include failure to thrive,³⁴³ the

341. PA. STAT. ANN. tit. 11, § 2203 (Purdon Cum. Supp. 1977-1978).

342. E.g., FLA. STAT. § 827.07(1)(i), as amended by ch. 77-429, 1977 Fla. Sess. Law Serv.

343. "Failure to thrive" refers to the condition of a child (usually under the age of one year) "who fails to grow in height and weight and to develop in personal-social, adaptive, language, or fine and gross motor areas, as compared to pre-established standards over a period of time (generally several weeks)." NAT'L CENTER ON CHILD ABUSE AND NEGLECT, U.S. DEP'T. OF HEALTH, EDUCATION & WELFARE, 2 CHILD ABUSE AND NEGLECT: THE PROBLEM AND ITS MANAGEMENT 39-40 (1975).

ability to think and reason, and the control of aggressive or self-destructive impulses. These injuries must, however, be clearly attributable to the inability or unwillingness on the part of the parent or guardian to exercise a minimum degree of care toward the child.³⁴⁴

(c). *Evidentiary standards in a child abuse case.* One commentator has noted that it is extremely difficult to prove a case of child abuse committed by a parent, owing to the high standard of proof which must be met by the prosecution in a judicial proceeding.³⁴⁵ There is an argument that while criminal prosecution of the battering parent³⁴⁶ may satiate society's desire for retribution, it does not cure the problem of individual cases of child abuse; nor does it take into consideration the child's independent interests.³⁴⁷ Further, it has been argued that there exists a risk that criminal prosecution of the parents may result in irreparable harm to the best interests of the child.³⁴⁸

In most family courts, even though the standard of proof to be met is that of a preponderance of the evidence rather than proof beyond a reasonable doubt, "this standard must be met by legally sufficient evidence."³⁴⁹ The prosecution in many instances is bound to rely on circumstantial evidence. To alleviate the prosecutor's burden somewhat, a number of states have enacted legislation designed to allow "evidence that the child has been abused or has sustained a nonaccidental injury [to] . . . constitute prima facie evidence . . . sufficient to support an adjudication that such [a] child is uncared for or neglected."³⁵⁰

344. *E.g.*, COLO. REV. STAT. § 19-10-103(1)(b) (Cum. Supp. 1976).

345. Fraser, *supra* note 153, at 117.

346. The Court of Appeals for Maryland in a 1975 decision held in *State v. Fabritz*, 276 Md. 416, 348 A.2d 275 (1975) that the state's child abuse statute applied to a mother's failure to obtain medical help for her badly injured daughter. "The mother, embarrassed by the condition of her daughter's body" after she had left the child in the custody of another man and woman, refused to take her child to the hospital even after noting that her daughter was in a semicomatose state. Recent statutory changes have made the parent liable for the "unattended worsening of obviously serious medical conditions." The court viewed such conduct as being the equivalent of inflicting physical injury. The court further stated that this was "especially true since the statute makes the parent responsible for providing the necessities of life including medical care." Therefore, the Court of Appeals found that criminal child abuse was properly found by the trial court.

347. See Friedrich & Borniskin, *supra* note 40, at 216; Fraser, *supra* note 153, at 119; Grumet, *supra* note 62, at 307.

348. Fraser, *supra* note 153, at 119.

349. Paulsen, *supra* note 190, at 155.

350. CONN. GEN. STAT. ANN. § 17-38a(f)(4) (Cum. Supp. 1978).

A number of jurisdictions have recognized the battered child syndrome in criminal cases when the syndrome is enunciated by an expert witness.³⁵¹ Such an expert witness is usually the treating physician but may as well be a pathologist or other medically-trained person. The Supreme Court of California in *Landeros v. Flood*³⁵² recognized that there exists widespread knowledge of what constitutes the battered child syndrome within the medical community. It is likely that other states will judicially recognize the battered child syndrome as being capable of diagnosis in the ordinary course of a physician's practice, and the testimony based upon the symptoms of the syndrome will be admissible into evidence in court.

3. CONCLUSION

Social problems and some of their more disturbing trends across the country are amenable neither to easy solutions nor to legislative actions at the state or federal level. Realistically, it must be recognized that the term "child abuse" is as much a political concept, defined to draw attention to the existing social problem, as it is a scientific concept which can be used to measure a specific phenomenon. The use of child abuse as a tool to make the public conscious of the problem has allowed state reporting laws to define the term as broadly or loosely as desired in order to magnify concern on this issue.

Mere reporting laws are not enough satisfactorily to combat abuse and neglect in this country. Positive programs at the state and local level must implement protective services for the child and therapeutic services to both child and parent. Without such programs it is clear that no "law can be better than its implementation, and its implementation can be no better than its resources permit."³⁵³

Effective measures to find a feasible solution to the problem must be based on long-term prevention. Recognizing child abuse as an infectious disease in which the victim becomes the carrier, with each generation passing on the illness to its children, underlines the need to detect, intervene in, and prevent the disease. The reporting laws, when they

351. See, e.g., *People v. Jackson*, 18 Cal. App. 3d 504, 95 Cal. Rptr. 919 (4th Dist. Ct. App. 1971) and *State v. Loss*, 295 Minn. 271, 204 N.W.2d 404 (1973), where expert testimony given by physicians concerning the battered child syndrome was admitted into evidence.

352. See text accompanying notes 207-20, *supra*.

353. Paulsen, *supra* note 85, at 49.

include provisions for protective services, can be utilized only if the full resources of the state can be brought to bear to meet the needs of the abused child and family on a case-by-case basis. Such a concerted effort can be accomplished only in light of certain fundamental rights of the abusive parents, the *parents patriae* interests of the state in protecting the health and well-being of children, and, lastly, the unspoken interest of the child. Protection of the child's interest must include adequate and timely representation by a guardian *ad litem* at any hearing which may result in removing the child from the family.

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